Supreme Court, U.S.
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(5)

No. 01-455

In the Supreme Court of the United States

FRANCONIA ASSOCIATES, *et al.*,

Petitioners,

vs.

UNITED STATES,

Respondent.

◊

GRASS VALLEY TERRACE, *et al.*,

Petitioners,

vs.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether a breach of contract claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

2. Whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following parties are petitioners in *Franconia Associates v. United States:*

Dublin Plaza, Inc.
Evergreen Manor Associates
Fox Ridge Phase II
Franconia Associates
Marilyn Graham
Greenway of Altoona Associates, Phase I
Greenway of Newton Associates, Phase I
David A. Hodges, Sr.
David A. Hodges, Sr. and Joanne M. Hodges
Phoebe J. Perri
Pine Needles Apartments
Prairie Village of Altoona Associates
Prairie Village of Grimes Associates
Prairie Village of Huxley Associates
Prairie Village of LaPorte City Associates
Prairie Village of Slater Associates
Prairie Village of State Center Associates
R.C. Getty Apartments
R.C. Mo Apartments
R.C. Pierre Apartments
R.C. Springs Apartments
Scenic Valley Associates
Timberbrook Properties
Valley Associates
Brian E. Wells

The following parties are petitioners in *Grass Valley Terrace v. United States:*

Margorie W. Kassner
Eileen R. Kothe
NRCB Limited Partnership

Peters, Williams & Kubota
Pine Needle Apartments Limited Partnership
Richard and Beatrice Schmidtbauer
The Highlands, a Limited Partnership

The following parties are plaintiffs in the trial court action in *Franconia Associates v. United States,* but were not appellants before the Federal Circuit and are not petitioners herein:

Eastwood Apartments
Greenway of Altoona Associates, Phase II
Prairie Village of Adel Associates
Prairie Village of Parkersburg Associates
Tucker Properties
Tucker Properties II

The following parties are plaintiffs in the trial court action in *Grass Valley Terrace v. United States,* but were not appellants before the Federal Circuit and are not petitioners herein:

Grass Valley Terrace
Jefferson Commons
Ripon Manor
Rural Community Builders
Waterloo Glen

Pursuant to Rule 29.6, petitioners state that of the forty-three parties listed above, only one, Dublin Plaza, Inc., is a corporate entity. All other petitioners and parties to the proceedings below are either individuals, partnerships, or limited partnerships. There are no parent corporations or publicly held companies that own ten percent or more of the stock of Dublin Plaza, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

CONTENTS OF APPENDIX xv

TEXT OF STATUTES AND REGULATIONS xvii

BRIEF FOR PETITIONERS 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

I. Statement of Facts 3

A. The Section 515 Program 3

B. Subsequent Legislation 8

1. *Early Congressional Attempts to Restrict the Agency's Acceptance of Prepayment Requests* 9

2. *The 1988 Legislation: ELIHPA* 10

3. *The 1992 Legislation and its Implementing Regulations* 12

C. Application of the Legislation 13

II. Proceedings Below 14

A. Proceedings Before the Court of Federal Claims 14

B. Proceedings Before the Federal Circuit 17

SUMMARY OF ARGUMENT 18

ARGUMENT 21

I. The Federal Circuit Exempted The Government From Standard Contract Law Principles By Holding That Petitioners' Contract Claims Accrued For Purposes Of 28 U.S.C. § 2501 Immediately Upon Enactment Of The 1988 Legislation. 21

A. The 1988 Legislation Constituted An Anticipatory Repudiation Of Petitioners' Termination Option, Which Did Not Start The Statute Of Limitations. 22

1. *The Law Of Anticipatory Repudiation* 22

2. *The 1988 Legislation Constitutes An Anticipatory Repudiation Of The FmHA's Contract Obligations.* 24

B. The Federal Circuit Created Contract Rules Applicable Only To The Government. 28

1. *The Law Of Anticipatory Repudiation As Applied To Contractual Options* 28

2. *The FmHA's Obligation Under The Contracts Was To "Accept" Prepayment Requests Submitted By Owners.* 29

C. The Federal Circuit Erroneously Held That Congress Retroactively "Eliminated" Petitioners' Contract Rights By Legislative Fiat, Thereby Triggering The Statute Of Limitations. 32

1. *Congress Did Not Even Attempt To "Eliminate" Petitioners' Contract Rights.* 33

2. *Congress Avoided Unnecessary Disputes And Constitutional Challenges By Refraining From Retroactively Eliminating Petitioners' Rights.* 36

II. The Federal Circuit Deemed Petitioners' Takings Claims To Accrue For Purposes of 28 U.S.C. § 2501 Before, Under This Court's Precedent, Those Claims Became Ripe For Review 39

A. The 1988 Legislation Demands An "As Applied," Rather Than A "Facial," Takings Analysis. 39

B. The Decision Below Sidesteps This Court's Precedent By Ignoring The Language Of The Statute And Misstating Petitioners' Claims 42

III. The Decision Below Creates Unworkable And Illogical Rules Governing The Accrual Of Claims Against The Government Under 28 U.S.C. § 2501. 46

CONCLUSION 50

TABLE OF AUTHORITIES

Federal Cases

ACE INA Holdings, Inc. v. Kane, 1999 WL 959812 (E.D. Pa. 1999) 28

Adams v. United States, 42 Fed. Cl. 463 (1998) 38

Agins v. Tiburon, 447 U.S. 255 (1980) 39

Alaska Pulp Corp. v. United States, 48 Fed. Cl. 655 (2001) 23, 26, 27, 38

Alder Terrace v. United States, 161 F.3d 1372 (Fed. Cir. 1998) 25

Bank of America v. United States, 51 Fed. Cl. 500 (2002) 25

Bayou des Familles Development v. United States, 130 F.3d 1034 (Fed. Cir. 1997) 46

Biddison v. Chicago, 921 F.2d 724 (7th Cir. 1991) 41

Bingaman v. Department of the Treasury, 127 F.3d 1431 (Fed. Cir. 1997) 47

Board of Regents v. Tomanio, 446 U.S. 478 (1980) 50

Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) 43

Cienega Gardens v. United States, 38 Fed. Cl. 64 (1997), *rev'd on other grounds*, 162 F.3d 1123 (Fed. Cir. 1998) 7

Cienega Gardens v. United States, 265 F.3d 1237 (Fed. Cir. 2001) 39, 42

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 21

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986) 37

Conoco Inc. v. United States, 35 Fed. Cl. 309 (1996) 24, 26

Cooke v. United States, 91 U.S. 389 (1875) 21

Data General Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996) 42

Dingley v. Olger, 117 U.S. 490 (1886) 22

Dow Chemical Company v. United States, 226 F.3d 1334 (Fed. Cir. 2000) 22

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 36

Far West Federal Bank v. Office of Thrift Supervision, 119 F.3d 1358 (9th Cir. 1997) 26

Franconia Associates v. United States, 43 Fed. Cl. 702 (1999), *recons. denied*, 44 Fed. Cl. 315 (1999), *aff'd*, 240 F.3d 1358 (Fed. Cir. 2001), *reh. denied*, No. 99-5123 (Fed. Cir. June 12, 2001) ..... *passim*

General Dynamics v. United States, 47 Fed. Cl. 513 (2000) 37, 38

Gilbert v. Cambridge, 932 F.2d 51 (1st Cir. 1991) 40

Grass Valley Terrace v. United States, 46 Fed. Cl. 629 (2000), *aff'd*, No. 00-5094 (Fed. Cir. May 17, 2001) ..... *passim*

Grass Valley Terrace v. United States, 51 Fed. Cl. 436 (Fed. Cl. 2002) 5, 37, 38

Greenbrier v. United States, 193 F.3d 1348 (Fed. Cir. 1999). ..... *passim*

Gulf Power Co. v. FCC, 208 F.3d 1263 (11th Cir. 2000) 40

Hermanowski v. Acton Corp., 580 F. Supp. 140 (E.D.N.Y. 1983), *aff'd in relevant part*, 729 F.2d 921 (2d Cir. 1984) 28, 29

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 40, 45

Holm v. CalEnergy Co., 229 F.3d 1157, 2000 WL 975177 (9th Cir. 2000) 28, 31

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 43

Kimberly Associates v. United States, 261 F.3d 864 (9th Cir. 2001) 37, 38

Kinsey v. United States, 852 F.2d 556 (Fed. Cir. 1988) 23

Lampf v. Gilbertson, 501 U.S. 350 (1991) 50

Levald v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1993) 40, 41

Liberty Mutual Insurance Co. v. Louisiana Department of Insurance, 62 F.3d 115 (5th Cir. 1995) 40

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) 37

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 39

Lucente v. IBM Corp., 146 F. Supp. 2d 298 (S.D.N.Y. 2001) 31

Lynch v. United States, 292 U.S. 571 (1934) 21, 37, 38

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 39

Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) 21, 22, 24-27, 30, 38

Montana v. United States, 440 U.S. 147 (1979) 47

National Adver. Co. v. Raleigh, 947 F.2d 1158 (4th Cir. 1991) 40

Norco Construction v. King County, 801 F.2d 1143 (9th Cir. 1986) 41

Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001) 39

Pennell v. San Jose, 485 U.S. 1 (1988) 45

Perry v. United States, 294 U.S. 330 (1935) 21

Plaintiffs in Winstar-Related Cases v. United States, 37 Fed. Cl. 174 (1997) 23, 25, 41

Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947) 21

Resolution Trust Corp. v. FSLIC, 34 F.3d 982 (10th Cir. 1994) 37

Roehm v. Horst, 178 U.S. 1 (1900) 22, 23

Saewitz v. Epstein, 6 F. Supp. 2d 151 (N.D.N.Y. 1998) 31

Schism v. United States, 239 F.3d 1280 (Fed. Cir.), *vacated on reh'g en banc*, 252 F.3d 1354 (2001) 26

Stone Forrest Industrial v. United States, 973 F.2d 1548 (Fed. Cir. 1993) 26

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 39

Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) 14

Terteling v. United States, 334 F.2d 250 (Ct. Cl. 1964) 46

Thetford Properties IV, L.P. v. Department of Housing and Urban Dev., 907 F.2d 445 (4th Cir. 1990) 37

U.S. Philips Corp. v. Sears Roebuck & Co., 55 F.3d 592 (Fed. Cir. 1995) 42

United States v. Allegheny County, 322 U.S. 174 (1944) 21

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 40, 45

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 43

United States v. Winstar Corp., 518 U.S. 839 (1996) 21, 30, 32, 38

Walker v. Hutchinson, 352 U.S. 112 (1956) 44

Warth v. Selden, 422 U.S. 490 (1975) 3

Waste Management, Inc. v. Metropolitan Government of Nashville and Davidson County, 130 F.3d 731 (6th Cir. 1997) 40

Williamson County Reg'l Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 39, 49

Yee v. City of Escondido, 503 U.S. 519 (1992) 43

Yuba Goldfields, Inc. v. United States, 723 F.2d 884 (Fed. Cir. 1983) 43

State Cases

Fullington v. M. Penn Phillips Co., 395 P.2d 124 (Ore. 1964) 29

Rossi v. Oristian, 376 N.Y.S.2d 295 (N.Y. App. Div. 1975) 28

Other Cases

Horchster v. De la Tour, 118 Eng. Rep. 922 (Q.B. 1853) 22

42 Op. Att'y Gen. 417 (Dec. 29, 1969) 8

Federal Statutes, Regulations, and Rules

28 U.S.C. § 1254(1) (1994) 1
28 U.S.C. § 1491 (1994) 14
28 U.S.C. § 2501 (1994) ..... *passim*
42 U.S.C. § 1472(b)(3) (1994) 8
42 U.S.C. § 1472(b)(4) (1994) 6
42 U.S.C. § 1472(c) (1994) 1, 30
42 U.S.C. § 1472(c)(4)(A) (1994) 11, 30, 34
42 U.S.C. § 1472(c)(5) (1994) 11
42 U.S.C. § 1472(c)(5)(A) (1994) 30
42 U.S.C. § 1472(c)(5)(G)(ii) (1994) 11, 12, 34, 41
42 U.S.C. § 1472(c)(5)(J) (1994) 12
42 U.S.C. § 1472 note (1994) 10
42 U.S.C. § 1485 (1994) 3
42 U.S.C. § 1490n (1994) 12
7 C.F.R. § 1822.95(c) (1978) 6
7 C.F.R. § 1866.2 (1978) 6
7 C.F.R. § 1866.2 (1983) 31
7 C.F.R. § 1866.3 (1983) 31
7 C.F.R. § 1865.2(c) (1979) 8
7 C.F.R. Pt. 1965-E (2000) 13
7 C.F.R. § 1965.90 (1983) 6
7 C.F.R. § 1965.90(b) (1987) 30
7 C.F.R. § 1965.90(e) (1983) 31
7 C.F.R. § 1965.211 (1993) 6
7 C.F.R. § 1965.215 (2000) 1

7 C.F.R. § 1965.215(a) (2000) 13, 34
7 C.F.R. § 1965.215(b) (2000) 13
7 C.F.R. § 1965.215(c) (2000) 13, 34, 41
7 C.F.R. § 1965.215(e) (2000) 13
7 C.F.R. § 1965 Ex. E (1989) 6
53 Fed. Reg. 13244 (April 22, 1988) 12
55 Fed. Reg. 4985 (Feb. 13, 1990) 12
Fed. R. App. P. 28(j) 24

Legislative Materials

125 Cong. Rec. 18204 (1979) 5
H.R. Rep. No. 100-122(I), 100th Cong., 1st Sess. at 53 (1987), 1987 U.S.C.C.A.N. 3369 5
H.R. Rep. No. 96-154, 96th Cong., 1st Sess. at 43 (1979), 1979 U.S.C.C.A.N. 2359 9
S. Rep. No. 84, 81st Cong., 1st Sess. (1949), 1949 U.S.C.C.A.N. 1550 3
Pub. L. No. 96-153, § 503(b), 93 Stat. 1134 (1979), *codified at* 42 U.S.C. § 1472(c)(1),(2) 9, 30
Pub. L. No. 96-399, § 514, 94 Stat. 1671 (1980) 9
Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988), *codified as amended at* 42 U.S.C. § 1472(c) ..... *passim*
Housing and Community Development Act of 1992, Pub. L. No. 102-550, §§ 2, 712, 106 Stat. 3681, 3841 (1992), *codified in relevant part at* 42 U.S.C. § 1472(c) 13

Housing Opportunity Program Extension Act of 1996, Pub. L. 104-120, § 2, 110 Stat. 834 (1996) 27

Treatises

Am. Jur. 2d, Contracts (1990) 22

Corbin, CONTRACTS (1951) 31

Corbin, CONTRACTS (1964) 22, 24, 28, 32

Corman, LIMITATION OF ACTIONS (1991) 23

Jaeger, WILLISTON ON CONTRACTS (3d ed. 1968) 22, 23, 32

Murray, CONTRACTS (3d ed. 1990) 22, 23, 27

Nichols, EMINENT DOMAIN (2000) 45

Restatement (First) of Contracts (1932) 22

Restatement (Second) of Contracts (1981) 23, 27

Rotunda & Nowak, TREATISE ON CONSTITUTIONAL LAW (3d ed. 1986) 37

Books and Articles

Belden & Wiener, HOUSING IN RURAL AMERICA (1999) 3, 4, 6-9

Black's Law Dictionary (7th ed. 1999) 24

Burton, CONTRACTUAL GOOD FAITH (1995) 23

Rowley, *A Brief History Of Anticipatory Repudiation In American Contract Law*, 69 U. Cinn. L. Rev. 565 (2001) 22

Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1 (Jan. 1995) 43

CONTENTS OF APPENDIX

Relevant Decisions and Orders

Decision of the Federal Circuit in *Franconia Associates v. United States* (Feb. 15, 2001) 1

Order of the Federal Circuit in *Grass Valley Terrace v. United States* (May 17, 2001) 15

Decision of the Court of Federal Claims in *Franconia Associates v. United States* (May 6, 1999) 17

Decision of the Court of Federal Claims in *Grass Valley Terrace v. United States* (April 12, 2000) 45

Order of the Federal Circuit Denying Rehearing in *Franconia Associates v. United States* (June 19, 2001) 69

Text of Relevant Legislation and Regulations

Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) 71

28 U.S.C. § 2501 (1994) 82

42 U.S.C. § 1472(c) (1994) 83

7 C.F.R. § 1965.215 (2000) 91

Pleadings Below

First Amended Complaint in *Franconia Associates v. United States* (June 25, 1997) 106

Complaint in *Grass Valley Terrace v. United States* (Sept. 15, 1998) 135

Other Materials

Declaration of P.J. Perri in *Franconia Associates v. United States* (May 18, 1999) (with exhibits).....157

Loan Agreement for Pine Needle Apartments (Jan. 24, 1979).....165

Promissory Note for Wishing Well Associates (Dec. 31, 1975).....176

Real Estate Mortgage for Wishing Well Associates (Dec. 31, 1975).....178

TEXT OF STATUTES AND REGULATIONS

The pertinent text of the statutes and regulations at issue in this matter is reproduced in the Appendix ("App.") attached to the Petition for Writ of Certiorari. *See* App. 71-105. The provisions most significant to the disposition of this petition are as follows:

28 U.S.C. § 2501 (1994)

Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

42 U.S.C. § 1472(c) (1994)

Prepayment and refinancing provisions

* * *

(4)(A) Agreement by borrower to extend low income use.

Before accepting any offer to prepay, or requesting refinancing in accordance with subsection (b)(3) of this section of, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, the Secretary shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

* * *

(5)(A) Offer to sell to nonprofit organizations and public agencies

(i) In general

If the Secretary determines after a reasonable period that an agreement will not be entered into with a borrower under paragraph (4), the Secretary shall require the borrower (except as provided in subparagraph (G)) to offer to sell the assisted housing and related facilities . . .

* * *

(G) Exception

This paragraph shall not apply to any offer to prepay, or any request to refinance in accordance with subsection (b)(3) of this section, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, if –

* * *

(ii) the Secretary determines that housing opportunities of minorities will not be materially affected as a result of the prepayment or refinancing, and that –

(I) the borrower (and any successor in interest thereof) are obligated to ensure that tenants of the housing and related facilities financed with the loan will not be displaced due to a change in the use of the housing, or to an increase in rental or other charges, as a result of the prepayment or refinancing; or

(II) there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement.

7 C.F.R. § 1965.215 (2000)

Borrower rejection of incentive offer – approving/disapproving prepayment

* * *

(c) *Conditions under which prepayment may be approved.* In certain instances, prepayment may be approved after a borrower has rejected the incentive offer. . . . To determine whether a prepayment offer can be approved, the following decision steps must be followed by the Servicing Office:

(1) *The loan is not currently subject to restrictive-use provisions nor prohibition on prepayment.* To determine whether a loan not subject to restrictive-use provisions or prohibition on prepayment may prepay, and if so, what restrictions must be inserted in the release documents, the following determinations must be made.

* * *

(iii) If the Servicing Office determines that housing opportunities to minorities will not be materially affected as a result of prepayment, and that there is an adequate supply of safe, decent, and affordable rental housing within the market area for the foreseeable future, the borrower may prepay without restrictions. The provisions of paragraph (c)(3) of this section will apply.

* * *

(3) *It is determined by FmHA or its successor agency under Public Law 103-354 that restrictions are not needed.* If actions in accordance with § 1965.206(b)(2) of this subpart and paragraph (e)(3) of this section have been taken to ensure that alternative rental housing will be made available to each tenant upon displacement, the prepayment may be accepted without restrictions if:

* * *

(iii) Regardless of whether or not the loan is subject to restrictive-use provisions, a determination is made by FmHA or its successor agency under Public Law 103-354 that there is no longer a need for the housing (in accordance with exhibit E of this subpart).

BRIEF FOR PETITIONERS

OPINIONS BELOW

Franconia Associates v. United States, No. 97-381C, 43 Fed. Cl. 702 (May 9, 1999), *recons. denied*, 44 Fed. Cl. 315 (July 21, 1999), *aff'd*, No. 99-5123, 240 F.3d 1358 (Fed. Cir. Feb. 15, 2001), *reh. denied* (Fed. Cir. June 12, 2001) ("*Franconia*").

Grass Valley Terrace v. United States, No. 98-726C, 46 Fed. Cl. 629 (Apr. 12, 2000), *aff'd*, No. 00-5094 (Fed. Cir. May 17, 2001) (*per curiam*) ("*Grass Valley*").

JURISDICTION

Petitioners seek reversal of two closely-related decisions of the Federal Circuit. The Federal Circuit issued its opinion in *Franconia* on February 15, 2001. Petitioners timely filed a Petition for Rehearing En Banc, which the Federal Circuit denied on June 12, 2001. In the interim, the Federal Circuit issued a *per curiam* decision in *Grass Valley* on May 17, 2001.

This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioners filed a Consolidated Petition for Writ of Certiorari (the "Petition") on September 10, 2001 addressing both cases. The Petition was granted on January 4, 2002.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 2501 (1994) (App. 82); Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) (App. 71-81); 42 U.S.C. § 1472(c) (1994) (App. 83-90); 7 C.F.R. § 1965.215 (2000) (App. 91-105).

STATEMENT OF THE CASE

Petitioners are owners of properties located throughout rural areas of the United States that currently are operated as affordable housing projects financed by mortgage loans

issued by the Farmer's Home Administration ("FmHA")[1] pursuant to Section 515 of the Housing Act of 1949 (the "Section 515 program"). This case involves an attempt by Congress to alter, by statute, the terms of petitioners' agreements in order to limit the FmHA's ability to permit petitioners to terminate their participation in the program. The narrow questions presented are when petitioners' contract and takings claims accrued for purposes of the six-year statute of limitations set forth at 28 U.S.C. § 2501. The answers to these questions require an understanding of the nature of the program, the terms of the parties' contracts, and the impact of the subsequent legislation on petitioners.

The Section 515 program was intended by the government to develop rental housing in rural populations not normally served by conventional lenders. Designed to be used as affordable housing only during that period of time that the housing is financed by a government mortgage loan, the government by contract required each owner to prepay its loan when commercial financing became available. In addition, each owner had the contractual option to terminate the use of its property as affordable housing by prepaying its loan at a time of its own choosing during the term of its mortgage. In either case, prepayment enabled the owners to use their properties as conventional housing. The monies from prepayment could then be used by the government to finance alternative affordable housing needs in rural communities. Thus, prepayment helped the government achieve the ultimate goal of developing both affordable and conventional housing in rural America.

Petitioners are aggrieved by the FmHA's application of subsequent legislation that authorizes the agency to permit owners to terminate their participation in the program only

---

1 The FmHA was created as an agency within the United States Department of Agriculture. Although the agency is now known as the Rural Housing Service, this brief, like the opinions below, will refer to the agency by its original name.

when certain conditions are met. The legislation also prohibits the FmHA from accepting any prepayment that it otherwise may have required any owner to make unless those conditions are met. The restrictions imposed by the legislation arguably have frustrated the FmHA's ultimate goal of stimulating the growth of all types of housing in rural America to the detriment of both owners and tenants. For obvious reasons, however, petitioners focus on the legislation's impact upon their own individual situations.

I. Statement of Facts[2]

A. The Section 515 Program

Beginning in the 1960s, Congress established several programs encouraging private citizens to construct, own, and manage federally assisted affordable housing units. *See* Belden & Wiener, HOUSING IN RURAL AMERICA 114 (1999). The Section 515 program at issue here was one such program. Section 515 of the Housing Act of 1949 (codified at 42 U.S.C. § 1485), added to the Act in 1962, authorized the FmHA to enter into contracts with private owners to make loans for the purpose of developing housing for low- and moderate-income and elderly tenants in rural areas.[3]

---

2 The facts set forth herein are based primarily on the well pleaded allegations of petitioners' pleadings, which must be accepted as true for the purpose of this appeal. *See Warth v. Selden*, 422 U.S. 490, 501 (1975) (holding that in ruling on a motion to dismiss, both the trial court and reviewing courts must accept as true all allegations in the complaint and must construe the complaint in favor of the complaining party).

3 Rural housing programs under the Housing Act of 1949 initially consisted of public housing projects that were developed and operated by local housing authorities. *See* S. Rep. No. 84, 81st Cong., 1st Sess. (1949), 1949 U.S.C.C.A.N. 1550, 1566. By contrast, the Section 515 program and other contemporaneous housing programs were "private sector subsidy programs . . . that sought to involve private developers, both profit-motivated and nonprofit, in the production of rental housing." Belden & Wiener at 114. Initially, only nonprofit borrowers could obtain direct government loans, while for-profit owners could obtain insured non-subsidized loans. *Id.* The complexion of the program changed in 1972

The terms of each owner's contract with the FmHA were set forth in three documents: a loan agreement, a mortgage, and a promissory note. App. 165-81.[4] Owners retained title to their properties while in the program, but were bound to various "regulatory covenants" set forth in the loan agreement. Owners were required to accept only eligible persons as tenants, to charge no higher rents than those permitted by FmHA, to maintain cash reserves, and to comply with certain regulations not inconsistent with the terms of their contracts. App. 169-73, 177, 181. These regulatory covenants remained in force only during the pendency of the loan obligations, and thus would expire upon the loan's maturity date or upon such date as a prepayment might be made. App. 170, 176.[5]

Chief among the program's restrictions was a "return on investment" limitation. Under this provision, the only profit that an owner could earn while in the program was a maximum of eight percent of its "initial investment," *i.e.*, its down payment. App. 170. For example, an owner who made a $91,237 down payment on a project with a $1,238,000 mortgage would earn only a maximum of $7,299 per year so long as it remained in the program. *Id.* This maximum return remained the same regardless of how much equity

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when the agency also made subsidized loans available to for-profit owners. *Id.* at 116. It was after this policy shift that all of the petitioners in this action entered the program. App. 114-20, 140-42.

[4] Petitioners have moved to dispense with the filing of a joint appendix in this case. Accordingly, references herein are to the appendix filed with the petition for writ of certiorari.

[5] The parties' contracts described themselves as "contractually binding" and could be changed only by written agreement between the parties (a common provision in commercial contracts). App. 173. In addition, the loans were subject only to Section 515 of the Housing Act of 1949 and related regulations, which were specified to encompass only those regulations that were in existence at the time the contracts were executed and those future regulations that were "not inconsistent with the express provisions" of the contracts. App. 165-66, 177, 181.

the owner built up in the property and regardless of how much the property's market value increased over time.[6]

Mortgage loans under the program had terms of up to fifty years.[7] Obviously, none of the petitioners intended to stay in the program and abide by its restrictions for that far into the future, by which time few of them would still be alive. App. 128, 150-51, 158 ("My intent upon prepayment was to invest the proceeds . . . to fund my retirement."). Indeed, given the economic realities of the program, remaining in the program for fifty years would prove to be a "horrendous long term investment." *See Grass Valley v. United States*, 51 Fed. Cl. 436, 442 (Fed. Cl. 2002).[8]

Thus, petitioners secured a contractual "termination option" – the right to free themselves from the regulatory covenants by prepaying their loans at a time of their own

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[6] A simple example illustrates the increasing severity of this limitation as time passes. Suppose the owner described above entered into the program in 1979. *See id.* Assuming that after twenty years, by 1999, the owner had built up $1,000,000 of equity in the property and the market value of the property as a conventional apartment complex had risen to $2,000,000, the owner still would receive at most $7,299 per year, which by that time would amount to only 0.73% of its equity and only 0.36% of the property's fair market value. *See* Declaration of G. Morosani ¶26 (in trial court docket in *Grass Valley*, No. 98-726C). Thus, so long as owners remained in the program, their return was similar to that of an annuity. Unlike an annuity, however, investment in the Section 515 program required owners to take on the additional burden and expense of developing and operating a housing project.

[7] While certain petitioners held mortgages with fifty-year terms (App. 165, 176, 178), other mortgages under the program had terms of forty years. For simplicity, this brief will refer to the maximum fifty-year term.

[8] Certain tax benefits initially were available under the program, but those benefits ran out as each project's depreciation schedule expired. *See* 125 Cong. Rec. 18204 (1979) ("The tax advantage in this type of project looks toward a maximum term of about 10 years."); H.R. Rep. No. 100-122(l), 100th Cong., 1st Sess. at 53 (1987), 1987 U.S.C.C.A.N. at 3369 (noting that "the exhaustion of many tax benefits available to Section 515 participants was 'driving owners to prepay or refinance their FmHA loans'").

choosing, thereby terminating their participation in the program. *See* App. 112, 137. As with many commercial real estate mortgages, the promissory notes that petitioners signed included a prepayment clause, which provided that:

> Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower. (App. 176).[9]

The terms of this clause were incorporated into contemporaneous FmHA regulations. 7 C.F.R. § 1822.95(c) (1978). Other regulations, in existence when petitioners entered into their contracts and later promulgated, detailed the procedures that the parties were required to follow in submitting and processing prepayment requests. Among other things, owners were subject to a waiting period and were permitted to prepay only if the agency determined that they were able to obtain adequate commercial financing. *See, e.g.*, 7 C.F.R. § 1965.90 (1983); 7 C.F.R. § 1965 Ex. E (1989); 7 C.F.R. § 1965.211 (1993). If all applicable requirements were met, the agency was required to approve the request, execute the necessary releases, and return the security (*i.e.*, the property) to the owner. 7 C.F.R. § 1866.2 (1978).

Because the regulatory covenants imposed by the program remained in effect only "[s]o long as the loan obligations remain[ed] unsatisfied," *see* App. 170, the prepayment clause served as the vehicle for owners to exercise their right to leave the program and be freed of those covenants. *See* Belden & Wiener at 115 ("Where prepayment occurred, not only was the [FmHA] financing retired, but borrowers were released from enforceable agreements in the Section 515 notes or security instruments

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9 Congress vested the FmHA with the authority to draft the terms of its agreements with owners. 42 U.S.C. § 1472(b)(4) (providing that the loan instrument "shall . . . be in such form and contain such covenants as the Secretary shall prescribe . . . ."). Thus, the FmHA included the prepayment clause in the promissory notes pursuant to the express authority delegated to it by Congress.

that enabled [FmHA] to control the use of the housing"). Upon exercising their termination option, owners could realize the economic potential of their properties by either raising their rents to the rates that the market would bear or selling the properties based on their fair market value as conventional rental properties. App. 112-13, 138.

The termination option was a critical component of the Section 515 program from the perspectives of both the owners and the FmHA. None of the petitioners would have signed its contract absent the right to prepay and leave the program at some time before the expiration of its mortgage term.[10] App. 128, 150; *see also Cienega Gardens v. United States*, 38 Fed. Cl. 64, 75 (1997) (finding that, under parallel HUD housing program, prepayment served as one of the "primary incentives," an "essential aspect" of the program, and an "enticement" without which the owners would not have entered into the program), *rev'd on other grounds*, 162 F.3d 1123 (Fed. Cir. 1998). By the same token, from the government's perspective, the ability of owners to prepay and ultimately use their properties as market-rate investments served as a chief inducement to recruit private parties to enter into the program as originally created. *Id;* Belden & Wiener at 122 (noting that the Section 515 program was "predicated on the assumption that private, profit-motivated owners could be enticed to build, own and operate low-income rental housing" and that "prepayment is wholly consistent" with this strategy). Thus, both the

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10 Petitioners did not, as the courts below assumed, invest in the Section 515 program for the purpose of obtaining a low-interest rate loan. *See* App. 3, 17, 46. While owners were able to enter into the program with a modest down payment, the stated interest rates on the loans (which were not in fact low, *see, e.g.*, App. 176) provided the owners no direct benefit. This is because the *only* profit owners could receive while in the program was the minimal annual return on investment described above. Although government subsidies helped to produce an effectively low interest rate on the loans, the impact of those subsidies was to permit rents to remain low—a benefit that directly inured not to owners, but to the tenants.

petitioners and the government understood that petitioners entered into the program with specific investment goals that could not be achieved absent the right to be freed from the program's regulatory covenants. *See* App. 123, 128-29.

In fact, the privatization of properties in the Section 515 program—referred to by the FmHA as the "graduation" requirement or policy—was fully consistent with the goals of the program. 7 C.F.R. § 1865.2(c) (1979) (stating that by FmHA's policy, "graduation" by voluntary means is "desirable" and "[b]orrowers should by inspired to graduate as a mark of success in their financial affairs"). [11] Indeed, every contract contained a provision requiring owners to prepay their loans upon FmHA's demand as soon as commercial financing on similar terms became available. App. 173, 177, 180; 42 U.S.C. § 1472(b)(3) (requiring all section 515 loans instruments to contain this provision); 7 C.F.R. § 1865.2(c) (1979) ("When voluntary graduation by refinancing cannot be accomplished, there is a legal basis for enforcing the refinancing provisions . . . ."); Belden & Wiener at 114-15. The monies received through prepayment or "graduation" could then be used to finance additional affordable housing under the program, *see* 42 Op. Att'y Gen. 417, 419 (Dec. 29, 1969), which could be constructed to better accommodate then-current needs in each rural community.

B. Subsequent Legislation

As time passed, many owners began to exercise their termination option, prepaying their loans to realize the investment returns to which their contracts entitled them.

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[11] By "graduating" loans from the government as lender to lenders in the private sector, the Section 515 program would achieve its ultimate goal of developing both affordable and conventional rental housing in rural America. *See* Declaration of D. Greenwalt, ¶¶7-9 (in trial court docket in *Grass Valley*, No. 98-726C); *see also* Belden & Wiener, *supra*, at 114 (explaining that the Section 515 program "was intended to stimulate rental housing within markets and for populations not normally served by conventional lenders").

See H.R. Rep. No. 96-154, 96th Cong., 1st Sess. at 43 (1979), 1979 U.S.C.C.A.N. at 2359. The FmHA maintained that it was obligated to accept such prepayments despite concern that doing so would reduce the supply of affordable housing. *Id.* (noting that FmHA "believes it must honor requests to prepay or refinance these loans").[12]

1. *Early Congressional Attempts to Restrict the Agency's Acceptance of Prepayment Requests*

To reduce this potential loss of housing, Congress initially responded by passing a statute in 1979 that specifically prohibited the FmHA from accepting certain prepayments of Section 515 loans. Pub. L. No. 96-153, § 503, 93 Stat. 1134 (1979). During the debates over the 1979 legislation, however, some in Congress "argued that owners' property rights were paramount - that retroactivity was a breach of contract and unconstitutional." Belden & Wiener at 117. In response to the political uproar caused by this repudiation of the owners' rights, Congress repealed the statute in 1980 and restored the contractual termination option for loans issued prior to 1979. The 1980 legislation also required new owners to agree to operate their properties as low-income housing for a minimum of 15 or 20 years. Pub. L. No. 96-399, § 514, 94 Stat. 1671 (1980).[13]

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[12] The FmHA informed Congress in 1979 that it had "acted without sufficient foresight in 1972 when it authorized provision of subsidized loans to limited-profit sponsors." Belden & Wiener at 118. However, given the agency's decision to encourage for-profit owners to enter into the Section 515 program, while permitting and even compelling them to pay off their loans and privatize the housing, the increasing number of owners exercising their termination option was a natural progression of the program. *Id.* at 116-17 (noting that the agency "opened the front door to limited-profit borrowers without closing the back door").

[13] This change in the governing law is the basis for the two classes of plaintiffs in the original actions below - owners with claims based on pre-1979 contracts, whose original termination rights were restored by the 1980 legislation, and owners with claims based on post-1979 contracts, whose termination rights have always been exercisable only after a

After repeal of the 1979 legislation, prepayments by owners under pre-1979 contracts resumed. FmHA accepted prepayments of pre-1979 loans, as required by the contracts, for the ensuing six years. Then, on October 18, 1986, Congress imposed a moratorium prohibiting, with limited exceptions, the use of appropriated funds to process applications for prepayments under either pre- or post-1979 contracts. Originally scheduled to expire in mid-1987, this moratorium was twice extended through March 15, 1988. *See* 42 U.S.C. § 1472 note.

2. *The 1988 Legislation: ELIHPA*

Before the last moratorium expired, on February 5, 1988, Congress enacted the Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988), *codified as amended at* 42 U.S.C. § 1472(c) ("ELIHPA") (App. 71-81). Like the 1979 legislation, ELIHPA was designed to curb the loss of affordable housing that was resulting from prepayment.[14] To reach this goal, Congress devised a new scheme for the FmHA to apply in determining whether to grant owner requests to prepay. Whereas the owners' contracts and contemporaneous regulations obligated the FmHA to accept prepayment requests made by owners "at any time at [their] option," ELIHPA limited the circumstances under which the agency was authorized to "accept" such requests. Consistent with

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minimum of 15 or 20 years. Petitioners are all "pre-1979" owners, due to the fact that ELIHPA addressed only pre-1979 contracts and, as a result, only the pre-1979 claims were dismissed by the lower courts as untimely.

[14] ELIHPA was addressed not only to rural housing under the Section 515 program, but also to urban housing under sections 221 and 236 of the National Housing Act, which comes under the jurisdiction of the Department of Housing and Urban Development ("HUD"). The statute created similar changes for both FmHA and HUD housing. In both cases, ELIHPA authorized the relevant agency to accept prepayment requests where, among other things, it could make a determination that the housing was no longer needed or that tenants would not be displaced. *Compare* ELIHPA § 225 *with* ELIHPA § 241.

its goal of preserving only needed affordable housing, however, Congress did not prevent the FmHA from accepting prepayment and releasing an owner from the regulatory covenants when it determined that it no longer needed the housing.

The new scheme under ELIHPA involves a multi-step process for the agency to follow in making a decision on a prepayment request. *First*, the FmHA is required, "[b]efore accepting an offer to prepay," to attempt to persuade the owner to give up its termination option and keep its property in the program for at least an additional twenty years in exchange for certain "incentives." 42 U.S.C. § 1472(c)(4)(A) (App. 74, 83). *Second*, if an owner will not surrender its termination option and agree to extend the low-income use of the property, ELIHPA compels the owner, before exercising that option, to offer the property for sale to any qualified nonprofit organization or public agency for a six month period. *Id.* § 1472(c)(5) (App. 75-55, 84-87). A buyer can be "qualified" by the FmHA only if it agrees to maintain the low-income use of the property, and no sale can be completed unless the agency approves the purchase price. *Id.*[15] *Third*, if an owner is unwilling either to extend its participation in the program or subject itself to the forced-sale process, the agency can accept the owner's prepayment request (and thereby release the owner from the regulatory covenants) only if the owner agrees to maintain the low-income rental rates until the current tenants voluntarily move out. *Id.* § 1472(c)(5)(G)(ii)(I) (App. 89).

Finally, ELIHPA provides one exception that, while narrow, is key to the outcome of this matter. If the FmHA determines that there is no longer a need for affordable housing in the area where the subject property is located,

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[15] Although a hapless owner theoretically could prepay at the end of this "forced-sale" period if no "qualified" buyer emerges, the owner first has to gamble that its property will not be snatched away at a price not determined on the open market. App. 131.

and that housing opportunities for minorities will not be adversely affected, the agency must accept the prepayment request. *Id.* § 1472(c)(5)(G)(ii) (App. 89). Thus, the statute does not in all cases prohibit withdrawal from the program. Instead, if the statutory conditions may be satisfied when the request is made, the agency must accept the owner's prepayment request without restriction, thereby freeing the owner from the covenants set forth in the loan agreement.

ELIHPA also gave owners reason to believe that these restrictions on the FmHA's authority to accept prepayment requests were only temporary in nature. App. 124-26, 146-48. Congress entitled the statute an "emergency" Act and specifically found that, before a permanent solution could be devised, a major review of alternative responses to the threatened loss of low-income housing was required. *See* ELIHPA § 202(a)(9),(10) (App. 71-73, 124). The measures set forth in the statute were therefore described as "interim measures" to be applied by the agency "until the Congress [could] act on recommendations that [would] emerge from this review." *Id.* Certain petitioners were also led "to believe that permanent legal and/or regulatory changes currently under review would be made which would remove or significantly liberalize the temporary prepayment restrictions." App. 130. Congress thus advised any owner who might have been following the legislation to await the government's final word on the matter.[16]

3. The 1992 Legislation and its Implementing Regulations

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[16] The 1988 Legislation specifically required the issuance of "final regulations" to carry out its "interim" requirements. ELIHPA § 241, *codified in relevant part at* 42 U.S.C. § 1472(c)(5)(J) (Add. 28-29); *but see* 42 U.S.C. § 1490n (granting FmHA discretion to issue regulations on an "emergency basis" in lieu of promulgating final regulations). Final regulations were never issued before Congress spoke again. Instead, during the continuing Congressional review of prepayment issues, the FmHA issued a series of interim "emergency basis" regulations. *See* 53 Fed. Reg. 13244, 13245 (April 22, 1988); 55 Fed. Reg. 4985 (Feb. 13, 1990).

The final word came more than four years later, on October 28, 1992, when Congress enacted its final solution to the perceived problem resulting from the ability of Section 515 owners to exercise their termination option. Housing and Community Development Act of 1992, Pub. L. No. 102-550, §§ 2, 712, 106 Stat. 3681, 3841 (1992), *codified in relevant part at* 42 U.S.C. § 1472(c) ("the 1992 legislation"). The 1992 legislation made clear that the restrictions imposed by ELIHPA upon the FmHA's ability to accept prepayments from pre-1979 owners were permanent, and imposed the same restrictions upon the agency with respect to requests made by post-1979 owners.

The FmHA then issued regulations to implement the 1992 legislation. *See* 7 C.F.R. Pt. 1965-E (2000) (App. 91-105). The regulations set forth detailed procedures for the agency to follow in "approving or disapproving prepayments." *Id.* § 1965.215(a) (App. 91). Under the regulations, consistent with the 1988 and 1992 legislation, the agency can "accept" an owner's request to prepay only if, among other things, there is an adequate supply of alternative affordable housing in the area where the property is located. *Id.* § 1965.215(c)(1)(iii),(3)(iii) (App. 92-94). The regulations also set forth procedures for the agency to follow in determining whether this exception has been met and detail nine actions that the agency must take to process its "acceptance of prepayment," including releasing the owner's security instruments. *Id.* § 1965.215(b),(e) (App. 91, 95-103).

C. Application of the Legislation

At some point following the passage of ELIHPA, each of the petitioners determined that the time was ripe – based on their own financial circumstances, their retirement plans, current market conditions, and the housing demand in the area – to exercise their respective termination options. App. 128, 150-51, 158. Many petitioners filed written prepayment requests with the FmHA, which the agency denied based on the continuing need for affordable housing in the subject

market area. *See* App. 129, 157. Other petitioners who decided to prepay were informed by the agency and others that, based on market conditions in the area of their properties, any prepayment request would be denied under the requirements of the new statute, and that submitting a request therefore would be futile. App. 129-30.

Thus, none of the petitioners was able, at the time it desired to exercise its termination option, to satisfy the statutory conditions authorizing the agency to accept its prepayment request. Consequently, petitioners all remain chained to the Section 515 program and subject to its severe income restrictions to this day, and likely will remain so until their fifty-year mortgage terms expire, despite their original intent and present desire to leave the program and regain their freedom from the program's regulatory covenants. App. 129-32, 152-54.

II. Proceedings Below

A. Proceedings Before the Court of Federal Claims

Petitioners filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, in 1997 in *Franconia* and 1998 in *Grass Valley*, seeking damages resulting from their inability to terminate their participation in the program upon their intended prepayment dates.[17] App. 128, 131. Petitioners asserted two counts: a contract claim alleging that ELIHPA constituted an anticipatory repudiation of the agency's contractual obligations and a takings claim alleging that the legislation, as applied to their properties, effected

[17] As in any case brought under the Tucker Act, petitioners seek recovery of the damages suffered as a result of the government's actions and are not here seeking to invalidate ELIHPA on any constitutional ground. App. 112; *see Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993). Petitioners seek damages for being compelled to remain in the program for their full mortgage terms and thus will calculate their damages based on the period of time after they desired to leave the program and were prevented from doing so by the agency. App. 131.

takings of their real property interests.[18] App. 112, 129-32. All petitioners filed suit within six years after the date that they desired to leave the program.

The Court of Federal Claims issued its decision in *Franconia* on May 6, 1999, granting the government's motion to dismiss petitioners' contract claims on limitations grounds. The court held that ELIHPA constituted an immediate breach of petitioners' contracts and that their contract claims accrued on the date that the agency issued regulations implementing the statute. App. 28-29. To reach this conclusion, the court determined that the prepayment clause of petitioners' contracts imposed no duty of performance on the government whatsoever:

> A careful reading of this clause reveals that no performance by the government is required – it is merely a promise to allow the borrower to prepay at any time during the life of the loan.

App. 31; *see also* App. 32 (finding that "there was no performance due by the government under the contract"). The court concluded that the contracts imposed on the government nothing more than a continuing obligation to "keep its promise," and that the contracts therefore were breached when the government ceased keeping its promise by changing the law. *Id.* The court thus rejected petitioners' argument that the statute amounted to only an anticipatory repudiation of the FmHA's contractual obligations. *Id.*

Although the government did not move to dismiss petitioners' takings claims,[19] and although there had been

[18] Although the complaints were filed up to five years ago, to date, no discovery has taken place on any of the petitioners' claims.

[19] The government's decision not to seek dismissal of petitioners' takings claims on limitations grounds was understandable, given its contrary position in related litigation. Any argument by the government that the takings claims of the FmHA owners, like their contract claims, were filed too late because they accrued upon *enactment* of the legislation

no discovery or briefing with respect to those claims, the trial court went on to dismiss petitioners' takings claims *sua sponte*, finding that those claims accrued on the same date as the contract claims. Without any citation to the pleadings, the court characterized plaintiffs' allegations as asserting that a taking occurred when the government "passed the legislation because the mere passing of the legislation, *ipso facto*, deprives plaintiffs of their vested right to prepay." App. 24. Thus, the court deemed petitioners' takings claims to allege solely a "facial" taking of their contractual right to prepay, which would have accrued upon the passage of the legislation (or, as the court held, upon issuance of the implementing regulations). App. 34.[20]

Following *Franconia*, the Court of Federal Claims issued a nearly identical decision on the contract claims of the petitioners in *Grass Valley* on April 12, 2000. The *Grass Valley* court agreed that the only performance due by the government under the prepayment clause was "to keep its promise to *allow* borrowers" to prepay at any time. App. 56; *see also id.* at 55 (rejecting argument that the contracts obligated the government "to accept prepayment"). However, unlike the *Franconia* court, the *Grass Valley* court dismissed only those claims on which the government had moved, *i.e.*, petitioners' contract claims.

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would have been inconsistent with its argument that the takings claims of HUD owners were premature because they accrued only upon the agency's *application* of the legislation. *See, e.g., Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999).

[20] Petitioners sought reconsideration of the court's opinion on a number of grounds, including the fact that the court had mistakenly assumed that none of the petitioners had requested to prepay. As an example, petitioners submitted a declaration from petitioner Phoebe Perri in which she detailed her attempts to prepay and the FmHA's denial of her request. App. 157-58. Because there has been no discovery on the subject claims, Ms. Perri's declaration stands as the only evidence in the record on appeal concerning petitioners' efforts to prepay. The court acknowledged that it had misstated the facts, but denied the motion. *See* 44 Fed. Cl. 315 (1999).

B. Proceedings Before the Federal Circuit

On appeal in *Franconia*, the Federal Circuit affirmed, holding that ELIHPA immediately "took away" and "eliminated" petitioners' contract rights. App. 10, 14. The court thus held that petitioners' contract claims accrued on the day that the statute was enacted (rather than when the regulations were issued, as the trial court held) and became time-barred in February 1994, six years after ELIHPA's enactment.[21] App. 10. The Federal Circuit adopted the trial court's reasoning that "the note's prepayment provision did not require any performance on the part of the government" and that the government thus had no more than an intransitive duty "to continue to allow borrowers the unfettered right to prepay their loans at any time." *Id.*

The court then applied a similar analysis to petitioners' takings claims. The court defined petitioners' takings claims —contrary to their allegations—as asserting solely a taking of their "unfettered right to prepay" (*id.* at 14), rather than a regulatory taking of their real property interests. By characterizing petitioners' claims in this manner, the court proceeded to the conclusion that this right "was eliminated by the government with the passage of ELIHPA" and that petitioners' takings claims thus accrued upon enactment of the statute. *Id.* In so holding, the court made no mention of the fact that the statute vests the agency with authority to grant prepayment requests in certain circumstances.[22]

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[21] The question whether, under the lower court's reasoning, the limitations period commences on the date that ELIHPA was enacted or the date that its implementing regulations were promulgated is not at issue here, since petitioners filed suit more than six years after either date. Further, under the facts presented here, the anticipatory repudiation doctrine, described below, would apply to either event.

[22] Petitioners sought rehearing in *Franconia*, based in part on the Federal Circuit's prior opinion in *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999), where it held that the takings claims of HUD owners accrued not upon the enactment of ELIHPA, but at the later date when the agency

Following the issuance of the Federal Circuit's decision in *Franconia*, but before it denied rehearing in that case, the court issued a *per curium* decision in *Grass Valley* in which it affirmed without comment the dismissal of petitioners' contract claims on statute of limitations grounds. App. 15.

SUMMARY OF ARGUMENT

These cases come to this Court as the result of the Federal Circuit's determination that petitioners' claims are time-barred, a conclusion that it reached in total disregard of two of the most well-established precepts of law pertaining to actions for damages against the United States: (1) that the government is bound by the law governing contracts between private citizens when it enters into contracts, and (2) that a regulatory takings claim based on the application of a statute that allows for an agency decision on the scope of permissible use of the property in question is not ripe for judicial review until the agency renders such a decision. By ignoring these bedrock principles, the Federal Circuit permitted the government to obtain dismissal of petitioners' claims on statute of limitations grounds, depriving them of a hearing on the merits. The proper application of the law, however, demonstrates that petitioners' claims were filed in a timely manner.

Accrual of Petitioners' Contract Claims. There is no question that if this were a contract dispute between two private parties, petitioners' claims would be deemed timely and heard on the merits. Under the doctrine of anticipatory repudiation, petitioners' contract claims did not accrue upon the enactment of the legislation by Congress, but rather when the agency, applying the new restrictions set forth in the statute, breached its contractual obligation by refusing to accept petitioners' prepayment requests. This comports

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rendered a final decision on a prepayment request from each owner. The court denied the petition for rehearing. App. 70.

with the precedent of this Court recognizing the distinction between the *enactment* of legislation by Congress as a repudiation of the government's contractual obligations and the *application* of that law by the relevant agency as an actual breach. This Court should hold the government accountable to standard contract law principles and hold that ELIHPA amounted only to an anticipatory repudiation of the government's contract obligations, which did not result in the automatic triggering of the statute of limitations.

Contrary to these principles, the Federal Circuit presumed that the legislation "eliminated" petitioners' contract rights, thus causing the statute of limitations to commence to run immediately. Even a cursory review of the statute reveals, however, that Congress did not even attempt to "eliminate" petitioners' termination option. Rather, the FmHA retains authority to accept prepayment requests in certain circumstances, thereby releasing Section 515 owners from the regulatory covenants set forth in their agreements. By only restricting the agency's ability to accept owners' requests to exercise their termination option, Congress avoided larger constitutional problems it would have encountered had it completely eliminated petitioners' rights under their contracts with the government.

The Federal Circuit avoided this dispositive feature of the statute by devising a fictional account of the FmHA's duty of performance under the contracts. The court interpreted the government's obligation as encompassing only a duty to "continue to allow" petitioners to prepay, rather than as the performance of a contractual obligation to *accept* prepayments when tendered. The court thus concluded that petitioners' contract claims accrued when the government, by passing ELIHPA, ceased continuing to "allow" prepayments. However, the parties' contracts, the governing statutes and regulations, and the common law of contracts all make clear that the government was obligated not merely to *allow* owners to prepay, but to *accept*

prepayment requests submitted by owners. Indeed, absent such a reciprocal duty of acceptance, the contracts would be rendered illusory. The lower court's attempt to absolve the government from its contract obligations, in order to justify its conclusion that any breach occurred automatically upon enactment of the statute, should not be permitted to stand.

Accrual of Petitioners' Takings Claims. This Court has held time and again that a regulatory takings claim challenging a statute that holds open the possibility that the property owner may be permitted to use its property as desired is not ripe for judicial review until the agency charged with implementing the statute renders a decision on the permitted use of the property. By its terms, ELIHPA grants the FmHA the authority to accept prepayment requests and thereby free owners from the program's regulatory covenants in specified circumstances.

As a result, the statute clearly calls for an "as-applied" takings analysis, rather than the "facial" analysis that the lower courts appeared to adopt. This holds true whether the property right at issue is viewed as a state-created real estate interest, as petitioners pled, or as a contractual right to prepay, as the courts below characterized it. By holding that the statute of limitations on petitioners' takings claims commenced upon enactment of the statute, the Federal Circuit effectively held that petitioners' claims *accrued* before they became *ripe* for review. This cannot be the law.

Finally, the Federal Circuit's analysis, if permitted to stand, will spawn judicial inefficiencies and unfairness to litigants. In order to maintain logical and consistent rules governing the accrual of claims against the government, this Court should not view petitioners' contract and takings claims in isolation from one another. The Court should hold that because the statute leaves open the possibility that owners will be freed from the regulatory covenants upon their request to leave the program, neither petitioners'

contract claims nor their takings claims accrued immediately upon the enactment of ELIHPA.

ARGUMENT

I. The Federal Circuit Exempted The Government From Standard Contract Law Principles By Holding That Petitioners' Contract Claims Accrued For Purposes Of 28 U.S.C. § 2501 Immediately Upon Enactment Of The 1988 Legislation.

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000) ("*Mobil*") (internal quotations and citations omitted); *accord United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) ("*Winstar*"); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) ("The United States does business on business terms."); *Perry v. United States*, 294 U.S. 330, 352 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Cooke v. United States*, 91 U.S. 389, 398 (1875) (when the United States "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there").[23]

As this Court held in *Winstar*, holding the government accountable to such standards is essential to protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." 518 U.S. at 883. By contrast, a rule "expanding the Government's opportunities for contractual abrogation" would have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* at 884. The

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[23] Government contracts are controlled by the federal common law of contracts, *see United States v. Allegheny County*, 322 U.S. 174, 183 (1944), which, in turn, is informed by "the principles of general contract law," *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947).

Federal Circuit's decision in this case creates that very danger, in that it rejects contract claims against the government as time-barred when indistinguishable claims brought against a private party would be deemed timely.

A. The 1988 Legislation Constituted An Anticipatory Repudiation Of Petitioners' Termination Option, Which Did Not Start The Statute Of Limitations.

1. *The Law Of Anticipatory Repudiation*

One basic principle of contract law is the doctrine of anticipatory repudiation, set forth in the Restatement (Second) of Contracts § 250 ("Restatement") (1981). *See Mobil*, 530 U.S. at 608.[24] The Restatement defines a repudiation as a "statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." Restatement § 250. An anticipatory repudiation occurs where one party to a contract impairs the other party's expectation of performance before the time for performance arrives. [25] *Id.* at 271. Such a statement of

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[24] The doctrine of anticipatory repudiation can be traced back to the landmark case of *Horchster v. De la Tour*, 118 Eng. Rep. 922 (Q.B. 1853). *See Roehm v. Horst*, 178 U.S. 1 (1900); *Dingley v. Olger*, 117 U.S. 490 (1886); *Dow Chemical Company v. United States*, 226 F.3d 1334, 1344 (Fed. Cir. 2000); 17A Am. Jur. 2d, Contracts § 448 (1990); Corbin, CONTRACTS §§ 959, 1053 (1964) ("Corbin"); Jaeger, WILLISTON ON CONTRACTS §§ 824, 1300 et seq., 2027B (3d ed. 1968) ('Williston"); Murray, CONTRACTS § 109 (3d ed. 1990) ("Murray"); Restatement (First) of Contracts § 318 (1932); Rowley, *A Brief History Of Anticipatory Repudiation In American Contract Law*, 69 U. CINN. L. REV. 565 (2001). Applications of the doctrine can arise in "myriad situations." Murray, § 109(A); *see also* Corbin, § 1053 ("It is not at all uncommon for a contractor to repudiate the contract before the time for performance arrives.").

[25] The doctrine thus recognizes that a breach does not occur until the time for performance arrives and the obligor fails to perform. *See* Restatement § 250, illus. 1; Williston, § 1300 ("One who contracts to do a certain thing on a certain contingency or at a certain time does not and indeed cannot break that promise unless the contingency happens or the

prospective non-performance can consist of either a statement by the obligor of its intention not to perform under any circumstances or a statement of "intention not to perform except on conditions going beyond the contract." Restatement § 250, cmt. b; Murray, § 109(C).[26]

The fact that an action amounts to a repudiation rather than a breach has important consequences for the statute of limitations. In response to an anticipatory repudiation, the obligee may either sue immediately or await the time that the obligor's performance under the contract comes due. Williston, § 1337; *Roehm*, 178 U.S. at 10 (finding it "reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done"). If the obligee elects to wait, the statute of limitations on a claim for breach does not commence to run until the time for performance arrives and the obligor actually fails to perform. *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988); *Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174, 183 (1997); Corman, LIMITATION OF ACTIONS § 7.2.1 (1991).

By granting the non-repudiating party these options, the doctrine serves an important policy interest. Allowing the obligee to defer suit until the time for performance arrives provides the obligor an opportunity to retract its wrongful repudiation and perform as promised, thereby eliminating the need for a lawsuit. Murray, § 109(E)(5); Williston, § 2027B. As Professor Corbin explains:

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time arrives."); Burton, CONTRACTUAL GOOD FAITH § 6.3.1 (1995) (while a breach impairs a party's interest in "present performance" under the contract, a repudiation impairs the interest in "future performance").

[26] *See also Alaska Pulp v. United States*, 48 Fed. Cl. 655, 659 (2001) ("The archetypal repudiation, therefore, occurs when one party to a contract attempts to unilaterally alter the contract or to condition his performance on terms that were not part of the bargain.").

> The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately. (Corbin, § 989).

2. *The 1988 Legislation Constitutes An Anticipatory Repudiation Of The FmHA's Contract Obligations.*

This Court's decision in *Mobil* makes clear how the doctrine of anticipatory repudiation applies in the context of legislation passed by Congress that alters an agency's contract obligations.[27] There, the government was obligated under contracts with oil companies to approve oil exploration plans submitted by the companies, if proper, within thirty days after submission. 530 U.S. at 609-10. Subsequent legislation placed conditions on that approval, making it impossible for the government to approve plans submitted by the companies within the promised time frame. *Id.* at 611-12; *see also Conoco Inc. v. United States*, 35 Fed. Cl. 309, 318 (1996).

The trial court found, based on these facts, that the legislation constituted an "anticipatory repudiation" of the contracts. *Conoco, Inc.*, 35 Fed. Cl. at 327. This Court agreed, holding that "the Government's communication of its intent to commit [a] breach amounted to a repudiation of the contracts."[28] *Mobil*, 530 U.S. at 621; *see also id.* at 619 (noting that "if legislation passed by Congress and signed by the

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[27] Although *Mobil* was decided after this case was fully briefed to the Federal Circuit in *Franconia*, petitioners notified the court of the decision pursuant to Fed. R. App. P. 28(j). The Federal Circuit, however, failed to discuss or reference the case in its decision.

[28] A "repudiation" as discussed by the Court is no different from an "anticipatory repudiation." *See* Restatement § 250 ("repudiation" defined as a "statement . . . that the obligor will commit a breach"), *quoted in Mobil*, 530 U.S. at 608; *id.* illus. 1; Black's Law Dictionary 1306 (7th ed. 1999) ("repudiation" defined as "words or actions that indicate an intention not to perform the contract in the future; a threatened breach of contract").

President is not a 'statement by the obligor,' it is difficult to imagine what would constitute such a statement"). Thus, the legislation did not constitute an immediate failure to perform under the contracts, but rather a statement of the government's intent to breach the contracts in the future – a classic anticipatory repudiation. This was true even though the statute left no doubt that the government would not comply with its contractual obligations. *Id.* at 611-12, 618.[29]

Courts addressing the anticipatory repudiation doctrine in cases involving the question whether a legislative act immediately triggers the statute of limitations similarly have held that the *enactment* of the legislation at issue amounts to an anticipatory repudiation of affected contracts. These courts also have held that the limitations period does not commence to run until the later *implementation* of that legislation by the contracting agency results in an actual breach. *See Bank of America v. United States*, 51 Fed. Cl. 500, 506, 510 (2002) (claim accrued upon agency's "application" of statute, which gave plaintiffs "full notice" of breach); *Plaintiffs in Winstar-Related Cases*, 37 Fed. Cl. at 183 (applying *Winstar* to hold that "FIRREA was essentially a legally binding forecast of a future breach" and thus "falls well within the definition of an anticipatory repudiation").[30]

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[29] The Court's conclusion that the legislation constituted a repudiation of the contracts at issue, as opposed to a full breach, was key to its holding that the remedy of restitution was available to the contractors. *Id.* at 608.

[30] The Federal Circuit's decision in *Alder Terrace v. United States*, 161 F.3d 1372 (Fed. Cir. 1998) is not to the contrary. There, the court held that an HUD owner's claim accrued upon its "20-year anniversary" – the date when the owner first became eligible under its contract to prepay – which in that case came after both the date of ELIHPA's enactment *and* the date on which the agency denied the owner's request to prepay. *Id.* at 1375, 1379. Because the owner filed suit more than six years after HUD's denial, its claim would have been untimely even under the doctrine of anticipatory repudiation. As a result, the owner did not rely on the doctrine and the court did not address it. Any interpretation of *Alder Terrace* as holding that the owner's claims accrued immediately upon the

Other cases have also recognized this distinction between legislation as a "repudiation" and agency enforcement as a "breach." *See Schism v. United States*, 239 F.3d 1280, 1290 (Fed. Cir.), *vacated on reh'g en banc*, 252 F.3d 1354 (2001); *Far West Fed. Bank v. Office of Thrift Supervision*, 119 F.3d 1358, 1365 (9th Cir. 1997) (quoting Restatement § 253); *Alaska Pulp Corp.*, 48 Fed. Cl. at 659 (statute was statement of "prospective nonperformance" and agency implementation resulted in breach); *Conoco, Inc.*, 35 Fed. Cl. at 327; *see also Stone Forrest Indus., Inc. v. United States*, 973 F.2d 1548, 1552 (Fed. Cir. 1993). Underlying these cases is the principle that Congress does not breach contracts by passing laws; rather, a breach occurs when the agency with whom the plaintiff contracted takes some action in derogation of the contract based on the strictures of the law.

The Federal Circuit's holding that ELIHPA constituted an immediate breach of petitioners' contracts cannot be squared with this precedent. Just as the contracts in *Mobil* obligated the government to approve proper exploration plans submitted by the contractors, the contracts here obligated the FmHA to accept requests by owners to terminate their participation in the program. And just as the legislation in *Mobil* announced that the government would not approve exploration plans according to the terms of the contracts, ELIHPA announced that the government would not approve prepayment requests in accordance with petitioners' contracts. In both cases, the government's legislative act of placing extra-contractual conditions on its future obligations amounted to a repudiation of the contracts, which ripened into an actual breach only when the time for performance by the agency arrived.[31]

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enactment of ELIHPA would be directly at odds, not only with the facts of the case itself, but also with *Mobil* and the other decisions cited above applying the doctrine of anticipatory repudiation.

[31] This case thus presents a repudiation consisting of a statement by the obligor that it will perform its future obligations only "on conditions that

Mobil and its progeny thus dispel any notion that legislation cannot fit the bill of an anticipatory repudiation. *See* 530 U.S. at 619. It is also worth noting that a legislative repudiation, like any other repudiation, can be retracted. *See id.* at 621 (noting that the government did not argue that it "retracted" its legislative repudiation). In fact, the government had earlier repudiated petitioners' contracts by passing a law in 1979 that restricted the ability of the FmHA to accept prepayment, but then retracted that repudiation by passing another law in 1980 that restored the agency's authority. *See supra* at 9; *see also* Housing Opportunity Program Extension Act of 1996, Pub. L. 104-120, § 2, 110 Stat. 834 (1996) (restoring prepayment right of owners under HUD housing program).

Because ELIHPA constituted an anticipatory repudiation of the FmHA's contractual obligations, petitioners had the option of either suing immediately upon the repudiation or waiting until the time for performance arrived. Petitioners opted to wait, providing the agency with the opportunity to perform by releasing petitioners from the program's regulatory covenants upon their request. Indeed, given the fact that ELIHPA continued to compel the agency to perform this obligation in certain circumstances, it was certainly reasonable for petitioners to defer suit until they decided to exercise their termination option, submitted a request to the agency, and obtained a decision. Under the doctrine of anticipatory repudiation, petitioners cannot be penalized for

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go beyond the contract." *See* Restatement § 250 cmt. b; Murray, § 109(C); App. 126-28. In such a case—no less than in the case where the obligor states that it will not perform under any circumstances—the doctrine of anticipatory repudiation provides the obligor an opportunity to retract its repudiation. Moreover, the possibility also remains in such a case that the newly imposed conditions will be met when the time for performance arrives, causing the obligor to perform as originally promised. *See Mobil*, 530 U.S. at 621-22 (obligee "'does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation'") (quoting Restatement § 257); *accord Alaska Pulp Corp.*, 48 Fed. Cl. at 668.

making this choice. *See* Corbin, § 989. As petitioners all filed suit within six years after their intended prepayment dates, their claims are timely under 28 U.S.C. § 2501.[32]

B. The Federal Circuit Created Contract Rules Applicable Only To The Government.

1. *The Law Of Anticipatory Repudiation As Applied To Contractual Options*

If this were a dispute between private parties, there would be no question as to how these principles apply. The law is clear that a party's statement that it will not honor the terms of an option contained in a contract constitutes an anticipatory repudiation, such that the option-holder need not bring suit until after it attempts to exercise the option and the repudiating party fails to perform by accepting the tender. *See Holm v. CalEnergy Co.*, 229 F.3d 1157, 2000 WL 975177 at *1-2 (9th Cir. 2000) (table case); *Hermanowski v. Acton Corp.*, 580 F. Supp. 140, 143 (E.D.N.Y. 1983), *aff'd in relevant part*, 729 F.2d 921 (2d Cir. 1984); *ACE INA Holdings, Inc. v. Kane*, 1999 WL 959812 at *3 (E.D. Pa. 1999) (party's statement that it would not comply with stock option contract was an anticipatory repudiation because "time for performance" had not yet arrived); *Rossi v. Oristian*, 376 N.Y.S.2d 295, 297 (N.Y. App. Div. 1975) (a claim for breach of a stock option contract "which provides that plaintiff might exercise the option at any time, presents a situation where the Statute of Limitations does not commence to run until the person granted the option demands the stock").

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[32] Even if the doctrine of anticipatory repudiation did not apply in this case, the result would be the same. The doctrine permits plaintiffs to sue *before* the time for performance arrives. *See supra at* 23. Here, however, petitioners decided to await the time for performance under their contracts and brought suit only *after* the agency's actual breach. Therefore, petitioners' claims are timely under standard contract law principles even absent the application of the doctrine. The doctrine simply serves to illustrate the fact that because the legislation at issue was anticipatory in nature, it did not, as the court below held, amount to an immediate breach of petitioners' contracts.

This conclusion is mandated by the very nature of a contractual option, which vests the option-holder with the right to choose at which point during the promised period it wishes to exercise the option. A contrary rule allowing the limitations period to commence upon the defendant's repudiation "would permit the defendant to select the date of breach and thus rob the plaintiff of the value of his option." *Hermanowski*, 580 F. Supp. at 143; *see also Fullington v. M. Penn Phillips Co.*, 395 P.2d 124, 125 (Ore. 1964) (the "very privilege" for which an option holder bargains is "the assurance that he will have the entire option period in which to make his decision").

The result should be no different here. Petitioners' contracts granted them the option to terminate their participation in the program at any time that they desired during their fifty-year mortgage terms. As a result, the statute of limitations on petitioners' contract claims did not begin to run until each owner requested to terminate and the government failed to perform by accepting each owner's tender. The Federal Circuit's contrary holding that all Section 515 owners affected by ELIHPA were required to file suit within six years after its enactment, regardless of whether they attempted or even desired to prepay during that window of time, improperly permitted the government, rather than petitioners, to set the date of breach. In granting this power to the government, the court exempted it from standard principles of anticipatory repudiation.

2. *The FmHA's Obligation Under The Contracts Was To "Accept" Prepayment Requests Submitted By Owners.*

The Federal Circuit circumvented the application of the anticipatory repudiation doctrine here by finding that the agency had no duty under the contracts to perform by accepting prepayment requests. App. 10 (holding that "the note's prepayment provision did not require any performance on the part of the government"). Instead, the court held that the FmHA's only duty under the contracts

was to "continue to allow" petitioners to prepay. *Id.*; *see also* App. 8-9 (noting that petitioners' position was "premised upon the proposition that the FmHA's obligation under the loan contracts was to accept prepayment rather than allow prepayment"). The lower court's assessment of the FmHA's duty of performance, however, is contrary to both the terms of the contracts and the applicable statutes and regulations.

Petitioners' contracts, and the consistent regulations incorporated by reference therein, entitled them to prepay and free themselves from the program's regulatory covenants at any time. In particular, the contracts state that prepayments "may *be made* at any time" (emphasis added). This clause necessarily encompasses both an entitlement on the part of owners to submit prepayment requests *and* a reciprocal obligation on the part of the government to accept such requests when made. Any other interpretation would render the contracts illusory, in that absent a government obligation to accept prepayment, the owners' contractual right to prepay would be meaningless. *Mobil*, 530 U.S. at 620 (finding government consideration of plans submitted by contractors to be a "necessary reciprocal obligation" without which the contracts would be rendered "illusory"); *see also Winstar*, 518 U.S. at 921 (Scalia, J., concurring) (government contracts should not be read in a manner that renders government obligations "illusory").

The statutes and regulations governing the Section 515 program confirm that the FmHA's obligation was to accept prepayment requests made by owners and thereupon return the security (*i.e.*, the property) to the owner. ELIHPA and its implementing regulations are addressed to the FmHA's duty to "accept" prepayment. 42 U.S.C. § 1472(c)(4)(A), (5)(A); 7 C.F.R. § 1965.90(b) (1987). The 1979 legislation similarly was directed to the FmHA's "acceptance" of prepayment requests. Pub. L. No. 96-153, § 503(b), 93 Stat. 1134 (1979), *codified at* 42 U.S.C. § 1472(c)(1),(2) (describing when Secretary "may not accept an offer to prepay" and

when Secretary "shall accept such offer").[33] None of these provisions would make any sense unless the government actually had an obligation to "accept" prepayment requests.

Further, cases involving contractual option provisions consistently hold that once an option-holder exercises its option, the other party has a duty to perform by accepting the tender. *Holm*, 2000 WL 975177 at *1 ("obligation" to sell stock arose when option-holder "tendered the option price"); *Saewitz v. Epstein*, 6 F.Supp.2d 151, 157 (N.D.N.Y. 1998) ("the actual exercise of an option contract by the optionee is the performance of a condition precedent to the optionor's duty to perform") (citing 4 Corbin, CONTRACTS § 264 (1951)); *see also Lucente v. IBM Corp.*, 146 F.Supp.2d 298, 309 (S.D.N.Y. 2001) (option-holder "has sole power to decide when (or if) the optionor must perform"). Here, too, the government was obligated to perform by accepting prepayment if and when each owner tendered a request, and then releasing the security held by the government.

By finding that the contracts obligated the government to do no more than simply "continue to allow" owners to prepay, the court was able to hold that the only promise the government made under the contracts was to keep its promise. *See* App. 10; *see also* App. 31. This reasoning, if generally applied, would write the doctrine of anticipatory repudiation out of the law, in that any statement by a party of its intention not to perform under a contract could be converted into a breach of the duty to "keep the promise," so

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[33] Petitioners' contracts incorporate by reference regulations that also illustrate that the government's duty entailed not only an obligation to accept the owner's tender of prepayment, but also to complete a litany of tasks necessary to authorize and process the final payment, release the security, and permit the owner to exit the program. 7 C.F.R. § 1965.90(e) (1983) (outlining procedures for final payment and release); *id.* § 1866.2 (1983) (authorizing County Supervisor to execute the necessary releases to return the security to the borrower); *id.* § 1866.3 (1983) (detailing procedures for the county office to follow in handling final payment and delivering of documents to the borrower).

that the statute of limitations would begin to run immediately when the statement is made. Fortunately, the law of anticipatory repudiation avoids such absurd results by providing that the limitations period commences only when the time for performance arrives and the repudiating party actually fails to perform. *See supra* at 23-24.

Indeed, the notion of a promise to keep one's promise (*i.e.*, a promise not to repudiate) is merely a legal fiction, since no such promise is ever expressly made. *See* Corbin, § 1053 ("A forbearance to repudiate is never specifically promised."); Williston § 1309 ("If the defendant promised to employ the plaintiff upon June 1, the breach must be that he did not do that. A statement in May by the defendant that he is not going to employ the plaintiff upon June 1 can be a breach only of a contract not to make such statements."). Remarkably, the Federal Circuit converted this legal fiction into the government's only duty under the contracts.

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The presumption underlying the government's arguments appears to be the notion that, notwithstanding this Court's repeated admonitions that the government is bound to standard contract law principles when it enters into private contracts, the government is still somehow different. This is the same flawed logic that the government pressed, unsuccessfully, in *Winstar* and *Mobil*. This Court should reverse the decision of the Federal Circuit to hold the government accountable to standard contract law and protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883.

C. The Federal Circuit Erroneously Held That Congress Retroactively "Eliminated" Petitioners' Contract Rights By Legislative Fiat, Thereby Triggering The Statute Of Limitations.

The Federal Circuit avoided the bedrock principles of contract law set forth above that render petitioners' claims timely by also holding that ELIHPA immediately "took away," "eliminated," and "conclusively abolished a material contract right." App. 10, 12 n.3, 13, 14. Based on this reading of the statute, the court concluded that petitioners' contract claims must have accrued upon its enactment. App. 10. The language of the statute, however, leaves no doubt that Congress specifically refrained from such a retroactive abrogation of the government's own contractual obligations. Instead, Congress restricted the FmHA's ability to perform its future obligation of accepting a prepayment request if and when made, such that a breach of contract claim, if any, would accrue only upon the agency's actual denial of a prepayment request.

1. *Congress Did Not Even Attempt To "Eliminate" Petitioners' Contract Rights.*

An exhaustive review of the provisions of ELIHPA reveals no support for the Federal Circuit's holding that the statute "eliminated the allowance of [unfettered] prepayments" (App. 12 n.3) and thereby triggered the immediate accrual of the statute of limitations. In fact, ELIHPA specifically "allows" prepayment without any restrictions under certain circumstances. Congress clearly envisioned that owners would continue to submit prepayment requests and that the agency would continue to accept such requests in some cases. Indeed, detailed procedures for both the submission of prepayment requests by owners and the acceptance of such requests by the FmHA have existed throughout the Section 515 program's history. *See supra* at 6, 31 n.33. Through ELIHPA, Congress set forth further procedures for the agency to follow in determining whether to accept future prepayment requests.

For example, ELIHPA states that "*before accepting* any offer to prepay," the agency must make efforts to persuade the owner to remain in the program for another twenty

years or more. 42 U.S.C. § 1472(c)(4)(A) (emphasis added) (App. 83). The statute also requires the agency to accept owner requests to prepay when it determines, among other things, that there is no longer a need for affordable housing in the area where the property is located. 42 U.S.C. § 1472(c)(5)(G)(ii) (App. 89). The regulations promulgated under ELIHPA similarly provide that "prepayment can be accepted" where the agency makes this determination. 7 C.F.R. § 1965.215(a),(c) (App. 91-93).

Congress could have undertaken to immediately "eliminate" petitioners' contract rights had it enacted legislation simply prohibiting owners from *submitting* requests to prepay, or prohibiting the FmHA from *accepting* such requests under any circumstances.[34] It did neither. Rather, Congress simply chose to alter the agency's authority to accept future requests by owners to prepay their mortgages. This is precisely what petitioners alleged: that the statute restricted the agency's obligation to permit owners to exercise their termination option. App. 112 (alleging that the legislation repudiated the government's "obligation to permit FmHA contract holders to terminate their contracts at any time at their option").[35] Thus, the

[34] Irrespective of which approach Congress may have chosen, the analysis contained in Section I.A and I.B above makes clear that the statute of limitations would not begin to run until the time for government performance under petitioners' contracts arrives. Thus, even if Congress had altered the conditions under which petitioners could *submit* a prepayment request (as opposed to altering the conditions under which the agency could *accept* such a request), the limitations period would not start unless and until that request was denied, or the petitioner established that, at the time it desired to leave the program, it would have been futile even to submit a prepayment request because the conditions required for agency approval simply did not exist.

[35] *See also* App. 129 ("The Government's repudiation does not constitute a failure to carry out any immediate duty of present performance unless and until the date of Government performance required by each contract arrives, *i.e.*, the date that any FmHA contract holder would have achieved its option of terminating its contract but for the Government's

Federal Circuit's holding that ELIHPA effected an immediate elimination of petitioners' contract rights disregards not only the text of the statute, but also petitioners' allegations.

The Federal Circuit's erroneous holding that ELIHPA eliminated petitioners' contract rights, as opposed to having restricted the agency's authority to accept prepayments, is also contrary to its own prior decision in *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999). There, the court analyzed the sections of ELIHPA applicable to HUD and another statute passed in 1990.[36] The court concluded that the statutes do not *disallow* owners from prepaying, but rather impose conditions on the agency's ability to *approve* requests to prepay. *Id.* at 1357 (holding that "neither statute denies an owner the ability to prepay its mortgage loan; rather, both statutes provide that an owner may prepay, albeit in accordance with a plan of action approved by the Secretary"). There is no basis for the Federal Circuit to have reached the opposite conclusion in this case.

In sum, ELIHPA does not prohibit owners from requesting to prepay and does not in all instances prohibit the FmHA from accepting those requests. Rather, the possibility always remains under ELIHPA that the right of owners to be freed from the program's regulatory covenants upon prepayment will be achieved. As a result, the statute cannot possibly be understood as "eliminating" petitioners' rights. The Federal Circuit reached the contrary conclusion only by ignoring the terms of the statute. Accordingly, the Federal Circuit's holding that petitioners' contract claims

repudiation."); App. 126-28 (detailing the extra-contractual procedures the FmHA must follow under the 1988 and 1992 legislation in response to an owner's request to exercise its termination option).

[36] As explained above, the provisions of ELIHPA applicable to HUD, like those applicable to the FmHA, continue to authorize prepayment where the agency determines that there is no longer a need for the subject housing. *See supra* at 10 n.14.

accrued immediately upon the enactment of the statute should be reversed.

2. *Congress Avoided Unnecessary Disputes And Constitutional Challenges By Refraining From Retroactively Eliminating Petitioners' Rights.*

Faced with the task of limiting the loss of housing in the Section 515 program, Congress of course had a number of options before it. For example, it could have taken title to the properties through its power of eminent domain, after which the housing could have been operated and managed by the federal government. Congress also could have revoked the authority of the FmHA to consider any prepayment requests in the future, directing that any requests submitted be denied outright. It also might have declared the prepayment language in the owners' contracts null and void, or passed a law making it unlawful for owners even to submit prepayment requests to the agency.

Instead of taking any of these more extreme measures, which would have resulted in the immediate conscription of petitioners' properties or the abolition of their contract rights, Congress chose to set up a scheme that continues to permit owners to submit requests to terminate their participation in the program and authorizes the agency to grant such requests in certain circumstances. In this manner, Congress avoided potential disputes where: (1) the agency no longer needs the housing at the time the owner requests to terminate, or (2) the owner never decides to leave the program for some reason, and thus never submits a request.

By stopping short of eliminating petitioners' contract rights, Congress also avoided certain constitutional challenges. For example, under the circumstances here, an absolute and wholesale destruction of preexisting contract rights likely would have been invalidated as an impermissibly retroactive impairment in violation of either the Takings Clause or substantive due process. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 529 (1998); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-602 (1935).[37] Congress steered clear of such challenges by devising a regime that continues to permit owners to exercise their termination option in some cases. As a result, no owner can establish that its right to be freed from the program's regulatory covenants upon prepayment has been impaired until it attempts to exercise that option and is denied. *Cf. Thetford Properties IV L.P. v. Department of Housing and Urban Dev.*, 907 F.2d 445, 449 (4th Cir. 1990) (holding that owners under HUD housing program could not raise substantive due process challenge to ELIHPA until they complied with prepayment procedures set forth in statute).

Finally, had Congress drafted ELIHPA in a manner that truly "took away and conclusively abolished a material contract right" (App. 14), its actions would have raised deeper concerns about its authority to extinguish the government's own contractual obligations *ipse dixit* by passing legislation. It is important to note, in this regard, that because ELIHPA was targeted at Section 515 owners, that statute did not qualify as a "public and general" act within the protection of the sovereign acts defense.[38]

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[37] While Congress may have some latitude to enact legislation impairing contracts between private parties without running afoul of the Constitution, *see, e.g., Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211 (1986), it is held to a much higher level of scrutiny when it attempts to modify its own contractual obligations. *See* Rotunda & Nowak, TREATISE ON CONSTITUTIONAL LAW § 15.9(a) (3d ed. 1986) (explaining that this Court "has used a higher level of review to legislation that modifies the government's own contractual obligations than it does to federal legislation that alters or regulates private contracts") (citing *Lynch v. United States*, 292 U.S. 571 (1934)).

[38] Petitioners further note that because ELIHPA does not qualify for protection under the sovereign acts defense, the unmistakability doctrine has no application in this case. *See Kimberly Assocs.*, 261 F.3d at 869; *Resolution Trust Corp. v. FSLIC*, 34 F.3d 982, 984 (10th Cir. 1994); *Grass Valley*, 51 Fed. Cl. at 440; *General Dynamics v. United States*, 47 Fed. Cl. 513, 543 (2000). Further, even if the unmistakability doctrine did apply here,

Kimberly Assocs. v. United States, 261 F.3d 864, 869 (9th Cir. 2001) (finding it "unquestionable" that "the government was not acting in a 'public and general' capacity" when it passed ELIHPA, which "constituted a narrow, targeted piece of legislation aimed at relieving the government from onerous provisions contained in a finite number of specific contracts it had already entered"); *Grass Valley*, 51 Fed. Cl. at 443; *Adams v. United States*, 42 Fed. Cl. 463, 480 (1998) (sovereign acts defense inapplicable because ELIHPA "specifically targeted the termination options found in FmHA's contracts").[39] Thus, rather than undertaking the dubious task of legislatively abolishing rights under contracts which the government has entered into in its proprietary capacity, Congress focused its attention on the scope of the contracting agency's authority to perform under the contracts. In this manner, Congress left it to the agency to determine, in individual cases, whether owners will be permitted to exercise their right to leave the program.

In short, Congress avoided doing through ELIHPA precisely what the Federal Circuit held that it did, *i.e.*, "eliminating" petitioners' contractual right to prepay. Under the statute's scheme, petitioners' right to be freed

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the terms of petitioners' contracts satisfy the requirements of the doctrine. App. 176 (setting forth right to prepay in unambiguous terms); App. 173 (stating that agreement is "contractually binding" and can be changed only by written agreement); App. 165-66, 177, 181 (subjecting contract only to the governing statute as enacted and immunizing owners from inconsistent future regulations); *see also Winstar*, 518 U.S. at 887; *Lynch*, 292 U.S. at 580; *General Dynamics*, 47 Fed. Cl. at 546-48.

[39] *See also Mobil*, 530 U.S. at 619-20 (where sovereign acts defense not raised, government actions in passing legislation analyzed under standard contract principles: "the fact that [the government's] repudiation rested upon the enactment of a new statute makes no significant difference"); *Alaska Pulp Corp.*, 48 Fed. Cl. at 659 (rules applicable to a party's repudiation of a contract are "no different where the government as a party to the contract commits this same sin through subsequent legislation"). Here, as in *Mobil*, the government cannot rely on the sovereign acts defense, having failed to raise the argument below.

from the program's regulatory covenants can still be realized in certain circumstances. As a result, no breach or "elimination" of rights can be said to have occurred upon enactment of the statute, and the statute of limitations cannot be deemed to have accrued at that time.

II. The Federal Circuit Deemed Petitioners' Takings Claims To Accrue For Purposes of 28 U.S.C. § 2501 Before, Under This Court's Precedent, Those Claims Became Ripe For Review.

A. The 1938 Legislation Demands An "As Applied," Rather Than A "Facial," Takings Analysis.

This Court has long held that a takings claim based on a statute or regulation that allows for an agency decision on the scope of permissible use of the property at issue is not ripe for review until the agency renders such a decision. *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2458 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735-39 (1997) (chronicling prior decisions); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985) (as-applied takings claim accrues when the government makes a final decision on "how it will apply the regulations" to the property); *Agins v. Tiburon*, 447 U.S. 255, 260-63 (1980).[40] Thus, where federal legislation regulates the use of property but provides an escape hatch permitting the agency to exempt certain property from its requirements, a

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[40] It is also well-settled that a property owner need not request an agency decision when doing so would be futile. *Suitum*, 520 U.S. at 738-40; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992); *Cienega Gardens v. United States*, 265 F.3d 1237, 1246-48 (Fed. Cir. 2001). Because there has not yet been any discovery on petitioners' claims, there is no evidence in the record as to which petitioners have obtained a final agency decision and which can satisfy the futility doctrine. For simplicity, petitioners will at times refer herein to the need for an agency decision before a takings claim can become ripe, but expressly preserve their argument that certain petitioners will be able to establish that their claims satisfy the futility exception to the ripeness requirement.

takings claim is not ripe until the agency applies the legislation to the property in question. Otherwise, the agency's exercise of the authority granted to it under the statute to determine whether the owner will be permitted to use the property as desired would be undermined.

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981), for example, owners of coal mining lands alleged that the "mere enactment" of the Surface Mining Control and Reclamation Act effected a taking of their properties. Noting that the statute did not "categorically prohibit" the owners' intended use of the property, the Court held that the owners' takings claims were unripe. *Id.* at 297. The Court added that its holding did not preclude the owners from arguing that the statute "as applied" to their property resulted in a taking. *Id.* at 297 n.40; *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985) (government's mere assertion of jurisdiction over wetlands did not amount to a taking because under the permitting scheme created, "permission may be granted, leaving the landowner free to use the property as desired").[41]

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[41] The Courts of Appeal uniformly have recognized these principles and applied them in a variety of contexts, including both takings of real property interests (such as the case at hand) and cases involving purely monetary interests. *See, e.g., Gulf Power Co. v. FCC*, 208 F.3d 1263, 1271-72 (11th Cir. 2000); *Greenbrier v. United States*, 193 F.3d at 1358 (alleged taking of contractual prepayment right); *Waste Management, Inc. v. Metropolitan Government of Nashville and Davidson County*, 130 F.3d 731, 738 (6th Cir. 1997) (takings claim challenging waste disposal fee ordinance); *Liberty Mutual Insurance Co. v. Louisiana Department of Insurance*, 62 F.3d 115, 118 (5th Cir. 1995) (takings claim challenging insurance rate regulation); *Levald v. City of Palm Desert*, 998 F.2d 680, 689 (9th Cir. 1993) (takings claim regarding rent control ordinance); *Gilbert v. Cambridge*, 932 F.2d 51, 55-57 (1st Cir. 1991) (claim held unripe where scheme created by ordinance left open possibility "that landlords may be granted leave to use their property as they wish"); *cf. National Adver. Co. v. Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) (takings claim accrued upon enactment of ordinance that demanded "immediate compliance without exception").

The application of this precedent to the 1988 legislation is clear-cut. As detailed above, ELIHPA provides that the FmHA must accept requests by owners to terminate their participation in the program when it determines, among other things, that "there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement." 42 U.S.C. § 1472(c)(5)(G)(ii) (App. 89).[42] If the agency makes these determinations, the restrictions imposed by ELIHPA do not apply and the owner will be freed from the regulatory covenants imposed by the program. Thus, under the precedent of this Court, there can be no doubt that petitioners' takings claims did *not* accrue upon the "mere enactment" of ELIHPA. Because the statute grants the FmHA the power to grant owner requests to be freed from the program's regulatory covenants in certain circumstances, petitioners' takings claims present "as-applied" takings that could become ripe for review only upon implementation of the new requirements by the agency. As such, petitioners' takings claims did not accrue until that time.[43]

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[42] Regulations issued under the statute similarly provide that "[i]n certain instances, prepayment may be approved" without any restrictions imposed on the owner. 7 C.F.R. § 1965.215(c). In particular, "prepayment may be accepted without restrictions" where, among other things, "there is no longer a need for the housing." *Id.* § 1965.215(c)(1),(3). App. 92-94.

[43] It goes without saying that petitioners' takings claims could not have *accrued* until they became *ripe* for review. *Levald, Inc.*, 998 F.2d at 687 ("Determining when the cause of action accrued is merely the corollary to the ripeness inquiry."); *Biddison v. Chicago*, 921 F.2d 724, 728-29 (7th Cir. 1991) ("[A] taking accrues at the same time that it ripens."); *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986) (Kennedy, J.) ("[T]he same considerations that render a claim premature prevent accrual of a claim for limitations purposes."); *cf. Plaintiffs in Winstar-Related Cases*, 37 Fed. Cl. at 182 ("For a cause of action to accrue and the statute of limitations to run, the claim must be ripe. Common sense, as much as case law, dictates this maxim, for the alternative would lead plaintiffs into

The Federal Circuit recognized as much in *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999). There, HUD owners asserted a takings claim based on ELIHPA and a 1990 statute that restricted the agency's ability to approve prepayment requests. Noting that the legislation "expressly granted [HUD] authority to approve prepayment proposals" in some cases, the court held that the owners' takings claims were unripe because none of them had alleged that they sought HUD's approval. *Id.* at 1358-59; *see also Cienega Gardens v. United States*, 265 F.3d 1237, 1248 (Fed. Cir. 2001). Thus, while the court held that the takings claims of the HUD owners in *Greenbrier* were filed too early, it held that the materially indistinguishable takings claims of the FmHA, owners in *Franconia* were filed too late. There is no justification for the Federal Circuit's decision to follow this Court's precedent in *Greenbrier* and then ignore it in this case.[44]

B. The Decision Below Sidesteps This Court's Precedent By Ignoring The Language Of The Statute And Misstating Petitioners' Claims.

The Federal Circuit avoided these firmly entrenched principles of takings law only by turning a blind eye to the terms of the statute. In particular, the court disregarded the provisions of ELIHPA that require the FmHA to accept

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a conundrum in which their claims could be time-barred before even becoming amenable to judicial resolution.").

[44] Having prevailed in *Greenbrier* on its argument that each owner's takings claim would accrue only upon the agency's denial of a request to prepay, the government should have been estopped from taking the opposite position in this case simply because its interests have changed. The doctrine of judicial estoppel provides that "where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed." *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996); *see also U.S. Philips Corp. v. Sears Roebuck & Co.*, 55 F.3d 592, 596 (Fed. Cir. 1995) (judicial estoppel preserves the integrity of the judicial process by preventing litigants from playing "fast and loose" with courts).

owner requests to terminate their participation in the program where the agency determines that there is no longer a need for the housing at the time the request is made. Had the court heeded the fact that the statute permits owners to be freed from the program's regulatory covenants in some cases, it would have had no choice but to analyze petitioners' takings claims on an as-applied basis.

By reading this exception out of the statute, the court was able to conclude, similar to what it held with respect to petitioners' contract claims, that the statute "took away and conclusively abolished" petitioners' property interests. App. 14. The court thus treated petitioners' claims as asserting only a facial taking,[45] and treated the legislation as effecting an outright conscription of petitioners' property rights. As explained above, however, Congress specifically avoided taking any action that would effect an immediate abrogation of rights. *See supra* at 33-39. Indeed, had ELIHPA resulted in an immediate confiscation of affected properties, as the Federal Circuit suggested, the government no doubt would have been held liable for a total taking of every Section 515 property in the country. *See United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982); *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 235 (1897); *cf. Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 891 (Fed. Cir. 1983) (government argued that it "was careful to refrain from exercising its power of eminent domain, an act that would have unquestionably required it to pay the just compensation required by the

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[45] The court thus upset the fundamental distinction between "facial" and "as-applied" takings claims. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987) (recognizing the "important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation"); *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992) (distinguishing "facial" and "as applied" takings claims and explaining that only the former ripens upon enactment of the challenged legislation); Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 19 & nn.67, 70 (Jan. 1995).

Constitution"). Such an action also would have required the government to provide notice to every Section 515 owner of its action and provide just compensation to each of them. *See Walker v. Hutchinson*, 352 U.S. 112, 115 (1956).

The Federal Circuit overlooked not only the terms of the statute and its own precedent, but also petitioners' allegations. Petitioners pled that a taking of their properties occurred as of the date that petitioners actually would have terminated their participation in the program and achieved freedom from the regulatory covenants but for the restrictions imposed by the legislation.[46] Thus, petitioners alleged that the agency's *application* of the legislation, and not its mere *enactment*, effected a taking.

The court's analysis is not saved by its characterization of petitioners' claims as alleging a taking of their contractual prepayment right.[47] App. 14. First, the notion that the property interest upon which petitioners base their takings claims is an "unfettered right to prepay" finds no source in petitioners' pleadings. Rather, the record makes clear that petitioners, as title owners of the land and buildings at issue,

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[46] *See* App. 132, 155 ("As of the date of Government performance required by each contract entered into between defendant and the plaintiffs, defendant's conduct constitutes a taking of plaintiffs' properties for public use . . ."); App. 132, 154 (identifying the "date of Government performance" as "the date that each plaintiff would terminate its contract but for the Government's repudiation"); App. 157-58 (statement of petitioner Phoebe J. Perri that she did not suffer any damages before her unsuccessful attempt to prepay her mortgage).

[47] While the statement of issues set forth by the Court references the impact of the legislation on petitioners' "contractual right," it also recognizes that the true interest at issue is the "right to freedom from regulatory covenants." The prepayment clause of petitioners' contracts is simply the vehicle by which petitioners can obtain that freedom, regain their full original fee simple interests in their properties, and use their properties as they desire.

assert takings of their state-created real estate interests.[48] Second, as the Federal Circuit recognized in *Greenbrier*, 193 F.3d at 1356-59, even if petitioners had pled solely a taking of a contractual right to prepay, the possibility that termination requests may be accepted in some cases precluded the court from limiting its inquiry to whether the mere enactment of the statute amounted to a taking.

Moreover, even if petitioners had not alleged as-applied takings of their real property interests, the Federal Circuit still would have been bound by the nature of the statute to employ an as-applied analysis. In cases where a facial takings claim is precluded by the fact that the statute does not categorically prohibit an owner's desired use of the property, the proper inquiry is whether the claim is ripe under an as-applied analysis. *See, e.g., Hodel*, 452 U.S. at 295-97 & n.40; *Pennell v. San Jose*, 485 U.S. 1, 9-10 (1988); *Greenbrier*, 193 F.3d at 1358-59 (rejecting facial takings claim and then proceeding to an as-applied takings analysis); *see also Riverside Bayview Homes, Inc.*, 474 U.S. at 126-27. In this case, however, the Federal Circuit improperly ignored the language of the statute, applied only a facial takings analysis, and concluded that the claims are time-barred.

The Federal Circuit held that petitioners—and, by extension, every owner in the Section 515 program—should have filed their claims by February 1994, regardless of whether they had any intention of terminating their participation in the program by that time. In so holding, the decision creates a new accrual standard for takings claims, providing that a statute can effect a taking before it has any

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[48] *See* App. 112 (alleging takings of petitioners' "properties"); App. 129 (alleging that the government effected "a taking of plaintiffs' properties for public use" by, among other things, "requiring plaintiffs to house low-income tenants"); App. 131 (alleging diminution in fair market value of properties). Petitioners' interests in their properties include the right to economically productive use and enjoyment, the right to exclusive possession, and the rights to transfer, devise, and dispose of their properties. *See generally* 5 Nichols, EMINENT DOMAIN, § 5.01(5) (2000).

impact on the use of the property at issue. Under the court's ruling, owners will now have to choose between either filing early and risking dismissal on ripeness grounds or filing later and risking dismissal on limitations grounds. *Bayou des Familles Dev. v. United States*, 130 F.3d 1034, 1037-38 (Fed. Cir. 1997) (noting that the government "uses the ripeness doctrine as both a sword and a shield"). Surely, the Takings Clause should not be the subject of such gamesmanship.

III. The Decision Below Creates Unworkable And Illogical Rules Governing The Accrual Of Claims Against The Government Under 28 U.S.C. § 2501.

The Federal Circuit's holding has created unjust and unmanageable results. Take for example a typical owner who entered into the program in 1979 and who, after twenty years, desired to leave the program in 1999. Assuming that the conditions for prepaying without restrictions could not be met at that time, the agency would deny the owner's request. If the owner then desired to file suit in 1999 against the government for its failure to honor the terms of the contract, the owner would find that its contract claim had already become time-barred in February 1994, six years after the enactment of ELIHPA. The decision below thus would compel this owner to file suit by 1994, five years before it even had any desire to exercise its prepayment option, and, consequently, before it suffered any damages. *See Terteling v. United States*, 334 F.2d 250, 254 (Ct. Cl. 1964) ("a claim does not accrue until the claimant has suffered damages").[49]

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[49] Ironically, the rule advocated by the government would seem to render it liable in other cases for damages in an amount greater than the rule petitioners advance. By asserting that any breach or taking occurred upon enactment of the statute, the government becomes vulnerable to liability for damages going back to that date. Petitioners, however, are only seeking damages for that period of time during which they actually were harmed: starting from when they desired to leave the program and were prevented by the agency from doing so. *See supra* at 14 n.17.

Even more peculiar results arise when petitioners' takings claims are considered. The owner described above clearly would not have a ripe takings claim until 1999, upon the agency's denial of its prepayment request (though the Federal Circuit apparently would hold otherwise). As a result, the owner would have to bring its contract claim between 1988 and 1994 and then bring its takings claim in a separate suit brought between 1999 and 2005. This would leave a span of seventeen years within which the two suits, based on nearly identical facts, could be brought. Not only would this result be prejudicial to the parties bringing and defending against such suits, it would generate immense judicial inefficiencies by requiring courts to address the same facts and issues in separate suits that could be brought years, even decades, apart.[50]

This scenario is similar to the plight of the only petitioner with respect to whom there is any evidence in the record on appeal concerning prepayment. See App. 157-58. Petitioner Phoebe J. Perri owns an apartment building in Palmyra, Wisconsin that has been in the Section 515 program since 1978. Ms. Perri decided to prepay and leave the program in 1993, and submitted a request to the FmHA in November of that year. *Id.* Her request was deemed complete as of March 1994 and was denied by the agency thereafter. Thus, Ms. Perri's takings claim became ripe after March 1994 upon the agency's denial. *Id.* Under the Federal Circuit's reasoning, however, both her contract and takings claims already would have become time-barred in February 1994. Thus, the Federal Circuit held that Ms. Perri's claims were time-barred before they could even be considered ripe for

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[50] The fact that the owner would be forced to file separate suits to assert its contract and takings claims would lead to the further problem that the owner might be faced with a *res judicata* or collateral estoppel challenge in the second suit because the two actions would involve the same operative facts, even though it had no choice but to bring its claims in separate actions. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1436-37 (Fed. Cir. 1997).

review under this Court's precedent. That same untenable result would hold true for any Section 515 owner who did not desire to prepay, or did not obtain a final agency-decision on a request to terminate, prior to February 1994.

It is also useful to consider Ms. Perri's plight in 1988. Had she analyzed the 1988 legislation at that time, she would have had no reason to believe that her contract had been breached or her property taken. If able to parse through the lengthy provisions of the new law, she would first conclude that the statute had no immediate impact on her use of the property. Rather, it would be apparent that the new conditions on her ability to leave the program would come into play only after she decided to prepay and submitted a request to the agency. She would also see that if and when she submitted a request to prepay, the agency would evaluate her request according to the procedures set forth in the statute, which might or might not result in her being freed from the regulatory covenants contained in her agreement with the government.

Thus, in February 1988, Ms. Perri had no way of knowing whether she ultimately would be permitted to exit the program if and when she decided to exercise her prepayment option. She also did not know whether the government might, as it had before in 1980, repeal the prepayment restrictions before she decided to prepay. A reasonable owner in Ms. Perri's shoes should conclude that the prudent course of action is to wait until it actually was ready to exit the program, submit a prepayment request at that time, and await the agency's decision. If the agency accepted the request and agreed to terminate the regulatory covenants, the owner would have no reason to sue. If the agency denied the request, the time would then be ripe to bring an action for damages.

Indeed, consider what would have happened if Ms. Perri had decided not to wait and sued immediately in 1988 for breach of contract and a taking of her property. At that time,

she would not have been able to allege truthfully that, absent the legislation, she would already have requested to prepay. Nor would she necessarily have been able to prove at that time that her request would have been denied if submitted to the agency. Thus, the suit no doubt would have been challenged, and dismissed, as premature. *See Williamson County*, 473 U.S. at 193; *Greenbrier*, 193 F.3d at 1358-59. Moreover, if she had sued before or during the pendency of her prepayment request, and the agency later accepted rather than denied her request, she may have found herself accused of commencing a frivolous action.

The threat of these dire consequences is real. Unjustifiable results already are emanating from the lower courts. As discussed in Part II.A, *supra*, the Federal Circuit has held that the takings claims of HUD owners accrued, not when ELIHPA was passed, but at the later time when the agency applied the legislation to each property. *See Greenbrier*, 193 F.3d at 1358-59. As a result, the claims of hundreds of HUD owners have been dismissed as premature because they sued *before* invoking the agency's procedures for submitting a request to prepay. *Id.* At the same time, the claims of hundreds of FmHA owners have been dismissed as untimely because they waited to sue until *after* requesting to prepay.

The Federal Circuit's inconsistent opinions in *Greenbrier* and *Franconia* have given the government *carte blanche* to defeat owners' claims on whatever ground best suits its needs. Only those owners with the good fortune to have claims that could be challenged neither as unripe nor as overripe can be heard on the merits. The government has been playing fast and loose in these housing cases, and the courts below have chosen not to intervene. This Court should correct the decisional flip-flop by the Federal Circuit and prevent the government from successfully arguing directly contrary positions in different cases to defeat otherwise meritorious claims.

Statutes of limitation are designed to promote judicial efficiency and fairness. *See Lampf v. Gilbertson*, 501 U.S. 350, 357 (1991) ("limitations periods in general promote important considerations of fairness"); *Board of Regents v. Tomanio*, 446 U.S. 478, 487-88 (1980) (statutes of limitation "have long been respected as fundamental to a well-ordered judicial system"). Limitations rules that are logical and predictable create a level playing field in which plaintiffs can fairly obtain relief in the courts and putative defendants can be aware of when they may be subject to suit. Here, neither the government nor the petitioners could know whether the FmHA would permit any given owner to terminate its participation in the Section 515 program until that date upon which each owner decided to submit a prepayment request and either (1) learned that the agency had denied the request, or (2) concluded that, under the circumstances at issue, the agency had no authority to grant the request. Because every petitioner filed suit within six years of that date, fundamental considerations of fairness require that their claims be deemed timely and heard on the merits.

CONCLUSION

This Court should reverse the decision of the Federal Circuit, hold that petitioners' contract and takings claims were filed in a timely manner under 28 U.S.C. § 2501, and permit petitioners' claims to proceed to trial.

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Respectfully submitted,

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